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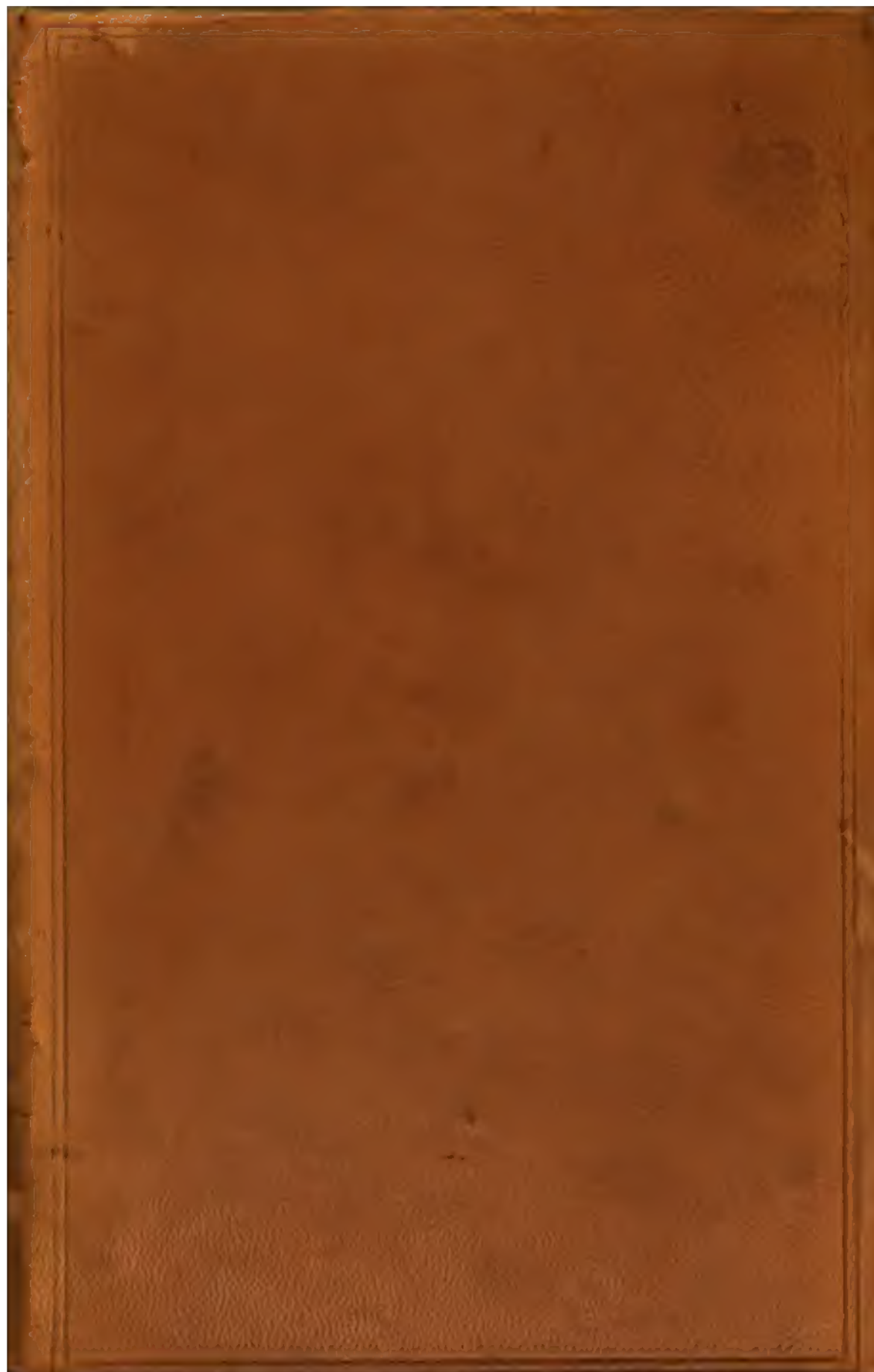
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RAILROAD REPORTS

(Vol. 43 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME XX.

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BROWN *v.* CHICAGO, R. I. & P. Ry. Co.

(Circuit Court of Appeals, Eighth Circuit, August 5, 1905.)

[139 Fed. Rep. 972.]

Carriers—Assault on Passengers—Liability.*—The liability or non-liability of the carrier of passengers for hire for an injury inflicted upon a passenger carried, by reason of a third person making an unprovoked assault upon him, depends upon the presence or absence of evidence showing the employees of the carrier either knew, or by the exercise of due care should have known, from all the attendant facts and circumstances of the particular case, that injury to the passenger carried was threatened or impending, and which injury, by the exercise of that high decree of care which the law requires of a carrier of passengers for their safety and protection, thus being foreseen, might have been guarded against.

In Error to the Circuit Court of the United States for the District of Minnesota.

J. A. Giantvalley (*Walter L. Chapin*, on the brief), for plaintiff in error.

McNeil V. Seymour (*Edward C. Stringer*, on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and POLLOCK, District Judge.

POLLOCK, District Judge. This is an action brought to recover damages for a personal injury sustained by plaintiff while riding as a passenger on one of defendant's regular passenger trains. The controlling facts are practically undisputed, and, stated in that light most favorable to the contention made by plaintiff, are: On the morning of August 10, 1902, plaintiff was a passenger on one of the regular passenger trains on defendant's line of railway en route from Enid, in the territory of Oklahoma, via Kansas City, Mo., to his home in Brookfield, Mo. When the train arrived at the breakfast station at Caldwell, in the southern part of the state of Kansas, a cowboy in a state of partial intoxication boarded the train with a ticket for Corbin, a small station about seven miles north of Caldwell, and entered the same car in which plaintiff and many other passengers were riding. At the time he

*For the authorities in this series on the duties and liabilities of a carrier with respect to assaults on its passengers by third parties, see foot-notes appended to *Illinois Cent. R. Co. v. Winslow* (Ky.), 14 R. R. R. 432, 37 Am. & Eng. R. Cas., N. S., 432; *O'Brien v. St. Louis Transit Co.* (Mo.), 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413; foot-note appended to *Bosworth v. Union R. Co.* (R. I.), 15 R. R. R. 9, 38 Am. & Eng. R. Cas., N. S., 9.

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entered the coach he was using and continued to use profane and abusive language. The train conductor, while engaged in the performance of his duties in another car, was informed of the conduct of this passenger, came into the car in which he was riding, and informed him he must stop the use of such language or get off the train. The schedule time of the train from the station of Caldwell to that of Corbin was about 12 minutes. After the conductor had taken up the ticket of the intoxicated passenger, and as the train neared the station of Corbin, he took hold of the passenger and forcibly proceeded with him to the platform of the car, where a scuffle ensued between them. At this time the passenger said to the conductor, prefacing the same with an oath, "I will get even with you." When the train stopped at Corbin, the intoxicated passenger was ejected therefrom. At this time plaintiff was sitting in the front seat of the day coach on the right-hand side of the car, by the window, playing with a little child. As the drunken passenger alighted on the platform at the station, he at once stooped down and picked up a piece of burned gumbo, used at that place on the road as ballast, weighing about two pounds, and hurled it through the window at which plaintiff was sitting, intending thereby to strike the conductor who had removed him from the train, but instead thereof hitting plaintiff in the back of the head, rendering him unconscious, and injuring him to such an extent as to require his removal from the train at the station of Wellington. This act of violence was suddenly entered upon and committed, and was apprehended neither by plaintiff nor the conductor of the train. At the time plaintiff was a married man about 50 years of age, earning \$3 per day. As a result of the blow he was seriously injured, and brought this action against the railway company to recover his damages incident thereto, alleging his injury to have been received through the negligence of the defendant company, in that it failed to accord him that high degree of protection which the law requires of a carrier of passengers toward one carried, and that his injury occurred through the concurrent acts of the drunken passenger and the conductor of the train. At the conclusion of the evidence the trial court directed a verdict for defendant. The sole assignment of error is based on this ruling.

From a consideration of the facts as above stated, giving the plaintiff the benefit of every reasonable inference that may be drawn therefrom, and viewed in the light of that high degree of care which the law requires of the carrier of passengers for hire for the safety and protection of the passenger, we are of the opinion the ruling of the trial court is right, and must be affirmed. The precise nature of the negligence charged against defendant is alleged in the petition as follows:

"That the plaintiff was injured by reason of the concurrent acts of defendant's conductor and the drunken man he expelled from the train in a very careless and negligent manner. That the

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man ejected from the train, as above stated, was very mad, angry, drunken, unsafe, dangerous, violently desperate, and insane with rage, and it was the duty of the defendant to exercise the highest degree of care in protecting its passengers from the danger and injury which might result from the act of removing such man from its train. That defendant failed to use proper care and precaution for the protection of this plaintiff against injury, in that the defendant's conductor did not, as is customary in cases of this kind, to protect the passengers, call a brakeman or any one else to assist him in removing the man from the coach and to the rear of the train."

It is thus seen the specific act of negligence charged against defendant is that the conductor of the train did not call to his aid the brakeman on the train, or other assistance, in removing the drunken, angry, and dangerous person from the train; whereas the violent act which resulted in injury to plaintiff arose after the removal of the intoxicated passenger from the train. It is, however, contended by counsel for plaintiff in argument that the conductor of the train should have apprehended the probability of danger to plaintiff, and was negligent in not guarding plaintiff against the same. *Spangler v. Railway Co.*, 68 Kan. 47, 74 Pac. 607, 63 L. R. A. 634; *Penny v. Atlantic Coast Line R. Co.*, 133 N. C. 221, 45 S. E. 563, 63 L. R. A. 497; *West Memphis Packet Co. v. White*, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427; *Snow v. Fitchburg R. Co.*, 136 Mass. 552, 49 Am. Rep. 40; *Indianapolis St. Ry. Co. v. Dawson* (Ind. App.) 68 N. E. 909, and other cases are cited in support of this contention. An examination of these cases, however, will show their inapplicability to the facts in the case at bar. They all rest for their support upon antecedent facts leading up to the injury, of such character as to inform the conductor, or others in charge of the conveyance, that injury to the passenger would be attempted, of such nature as ordinary prudence might and should have guarded against, and by a failure to so act the carrier was negligent. Thus, in *Spangler v. Railway Co.*, a case much relied upon by counsel for plaintiff, and in which the manner of inflicting the injury of which complaint was made was very similar to that in the case at bar, the court, after quoting with approval the rule laid down by Mr. Fetter in his work on *Carriers of Passengers* (volume 1, § 96) as follows: "Knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it"—made application of the rule to the facts in that case in the following language:

"From the evidence relating to the character, condition, and conduct of the young men, it is reasonable to conclude that some depredation was to be committed upon the St. Joe passengers at Gower. It is fairly inferable that the conductor knew, or should have known, of this danger, and hence that he should have

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exercised the highest vigilance and diligence to subvert it; that he failed to employ to that end any of the means at his command; and that the plaintiff's injury was the result of his negligence."

In *Penny v. Atlantic Coast Line R. Co.*, it is said:

"According to the uniform tendency of these adjudications (decisions of other courts), which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's neglect in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented."

In *West Memphis Packet Co. v. White*, which was an accidental injury by one passenger inflicted upon another, it is held:

"The owner of a steamboat is required to exercise the utmost vigilance and diligence in protecting its passengers from injuries from another passenger by the negligent and careless use of a loaded gun exhibited by him, where, under all the circumstances, such owner or his officers and agents might reasonably have expected or anticipated the injury."

In *Snow v. Fitchburg R. Co.*, in which a passenger standing on a depot platform awaiting the arrival of his train was injured by being struck by a mail bag thrown from the train in accordance with the custom known to the corporation, it is said:

"There was evidence in the case tending to show that mail bags had not infrequently been thrown from this car in such a way as to strike upon the platform where the plaintiff stood; and, if this evidence was believed, the court was justified in inferring that the defendant knew, or in the exercise of proper care ought to have known, this. It was within the power of the defendant to prevent this practice of throwing out mail bags, if in no other way, by withholding the use of the car, or by stopping the train at the station. The case presented is unlike that of the act of a passenger, which the defendant had no reason to anticipate or power to prevent."

In the case of *Indianapolis St. Ry. Co. v. Dawson* it is held:

"Where a street railway, owning a park reached by its lines and maintaining attractions for the public there, has knowledge that there is a conspiracy on the part of certain persons to assault any colored persons visiting the park, and knows of acts of violence committed pursuant to such design, and transports colored persons there without warning them of the danger, and they are assaulted pursuant to the conspiracy, the company's employees making no attempt to interfere, the railway company is liable for the injuries."

In *Meyer v. St. Louis, I. M. & S. Ry. Co.*, 54 Fed. 116, 4 C. C. A. 221, in which case one passenger was shot and killed by an insane passenger, and in which there was evidence tending to show the employees of the defendant company in charge of the train knew before the act happened of the insanity of the passenger committing the deed, this court ruled:

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"The railroad would not be negligent by reason of nonaction, if its employees, exercising the high degree of care demanded of them, could not have reasonably anticipated the effect of failure to restrain or eject such insane passenger."

"To charge the defendant company with the duty of restraint, it need not necessarily have been foreseen that the killing would take place, unless for such restraint. If a reasonable possibility of injury to any one of the passengers could have been foreseen, the obligation arose to take proper action for their protection, although it could not be anticipated which one of the passengers might be injured by such insane person, nor whether his violence would cause death or not."

In the light of authority, and in the very reason of things, the liability or nonliability of the carrier of passengers, in cases of this nature, must be held to depend upon the presence or absence of evidence tending to show the employees of the defendant carrier either knew, or by the exercise of due care should have known, from the circumstances of the particular case, injury to the passenger was threatened or impending, which injury, by the exercise of that high degree of care which the law requires of a carrier of passengers for the safety and protection of the passenger, might not only have been foreseen, but guarded against, thus averting the injury. The foregoing cases and others relied upon by counsel for plaintiff were ruled in favor of the liability of the carrier, but, as has been seen, in recognition of this principle. *Felton, Adm'r v. Chicago, Rock Island & Pacific Ry. Co.*, 69 Iowa 577, 29 N. W. 618; *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519; *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190. And in the many other cases cited by counsel for the defendant the nonliability of the defendant was adjudged upon this ground.

Applying this principle to the facts in the case at bar, as stated, the nonliability of the defendant follows, and follows for the reason that the act of violence resulting in injury to the plaintiff was suddenly entered upon and committed, entirely unapprehended and unforeseen by any one, and was in its nature and manner of execution of such character, in the light of attending circumstances, as to be clearly unexpected.

The judgment of the Circuit Court must be affirmed.

BALTIMORE & O. S. W. R. Co. v. MULLEN.

(Supreme Court of Illinois, Oct. 24, 1905.)

[75 N. E. Rep. 474.]

Carriers—Injuries to Passenger—Evidence.*—Where a passenger was injured in alighting from a train, the fact that it was dark, and that he felt no motion of the train and believed it had stopped, and got off at place pointed out to him by the officials as a depot, must be considered by the jury.

Same—Contributory Negligence.†—It is not negligence per se to alight from a moving train in the darkness at the direction of the train officials, or in the belief that it had come to a stop.

Same—Time to Alight.—A railroad company must give a passenger a reasonable time to alight safely at the end of his journey.

Appeal from Appellate Court, Third District.

Action by John Mullen against the Baltimore & Ohio Southwestern Railroad Company. From a judgment of the Appellate Division, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in case, brought in the circuit court of Cass county in March, 1902, by the appellee against the appellant company to recover damages for a personal injury. To the second amended declaration the plea of general issue was filed. The cause was tried before the court and a jury, and resulted in a verdict and judgment in favor of appellee for the sum of \$1,730. An appeal was taken to the Appellate Court, which has affirmed the judgment of the circuit court; and the present appeal is prosecuted from such judgment of affirmance. The following extract from the opinion of the Appellate Court, deciding this case, sets forth the material facts, to wit:

"This suit was before this court at a former term, and the judgment then appealed from was reversed because of errors in the instructions. 108 Ill. App. 637. Upon remandment the cause was again tried, resulting in a judgment for the plaintiff for \$1,730. The second trial was had upon the second and third counts of the declaration only, which charge, in substance, that the defendant had negligent and incompetent servants in charge of its train from St. Louis to Flora, Ill.; that said servants opened the vestibule doors of the coach in which plaintiff was riding, and called the station of Flora; that plaintiff then went

*For the authorities in this series on the question whether it is contributory negligence in a passenger to alight from a moving car or train, see foot-notes appended to *Birmingham Ry. Light & Power Co. v. Willis* (Ala.), 16 R. R. R. 523, 39 Am. & Eng. R. Cas., N. S., 523; foot-notes appended to *St. Louis S. W. Ry. Co. v. Highnote* (Tex.), 16 R. R. R. 41, 39 Am. & Eng. R. Cas., N. S., 41; foot-note appended to *Georgia, etc., Ry. Co. v. Hutchins* (Ga.), 15 R. R. R. 727, 38 Am. & Eng. R. Cas., N. S., 727.

†For the authorities in this series on the question of the care due alighting passengers, see foot-notes appended to *Willworth v. Boston Elevated Ry. Co.* (Mass.), 16 R. R. R. 69, 39 Am. & Eng. R. Cas., N. S., 39.

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out on the vestibule platform; that the conductor and brakeman were there, and one of them informed him the depot was 'right there,' indicating a point directly opposite where the train then was, and thus induced in his mind the belief that the train had stopped at the station; that it was in the nighttime, and so dark plaintiff could not distinguish any object, and by means of the false information thus given him by the conductor or brakeman he was induced to believe, and did believe, that the train had stopped; that he attempted to alight from said train, but that it was not at the place indicated, and had not stopped as plaintiff had been erroneously led to believe, and in attempting to alight he was drawn under the wheels and injured. On the morning of the accident, which occurred at about 4:35 o'clock, the appellee, a farmer, about 68 years of age, was a passenger upon one of appellant's trains for the purpose of being carried from East St. Louis to Flora, Ill., where he intended changing cars to another branch of appellant's road. He testifies that, when the conductor took up his ticket, he informed the conductor that he had had but little sleep for two nights, and asked to be waked at Flora; that as the train neared Flora the brakeman came into the car and called the name of the station, whereupon appellee awoke, arose, put on his overcoat, took his lunch basket on his arm, and went to the rear platform of the coach; that the conductor and brakeman were standing on the platform of the adjoining coach; that the vestibule doors were open; that he asked them where the depot was, and that one of them replied, 'Right there,' and pointed to the place where he afterwards got off; that said answer, and the fact that he did not feel the motion of the train, led him to believe that the train had stopped; that it was so dark he was unable to see whether or not it had; that he then stepped off, holding onto the railing as he did so, and was thrown under the wheels of the car. After appellee's wounds were dressed the agent of appellant procured from him a written statement as to how the accident occurred, which was introduced in evidence by appellant, and tends to corroborate appellee's testimony. The evidence also shows that, when the train approached Flora from the west, it first stopped at a point about 200 feet west of the crossing of the track of the main line of the road with that of what was called the 'Springfield Division'; running north and south, and then proceeded to the depot, which was located east of the crossing, in the angle formed by the main and Springfield tracks, at the rate of not to exceed five miles an hour. After the accident appellee was found lying near the main track about 40 feet west of the crossing. His hand was injured to such an extent that amputation was necessary. The conductor and brakeman both deny that they were at the place where appellee testifies they were when the accident occurred, or that either of them made any statement to him as to the location of the depot, or that they saw him get off. The brakeman admits that he awoke appellee before the train stopped for the crossing,

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and told him that the train was approaching Flora, and that appellee then got up, stepped into the aisle, and put on his overcoat, but denies that he saw him on the train thereafter, or that he called the station until after making the stop at the crossing. The evidence tends to show that there were a number of electric and other lights burning at and within the depot and other buildings in the vicinity of where the accident occurred, and that there were gas lights burning in the vestibule, through which appellee left the car."

Henry Phillips and Shutt, Graham & Graham (Edward Barton, of counsel), for appellant.

Mills & McClure, for appellee.

MAGRUDER, J. (after stating the facts). Upon the trial below, at the close of the plaintiff's testimony, the defendant asked the court to give the jury a written instruction to find the defendant not guilty, which was refused, and exception was taken. At the close of all the testimony defendant's counsel again asked of the court a written instruction to the jury to find the defendant not guilty, which was also refused, and exception taken. The refusal of the court to instruct the jury to find for the defendant raises the question whether there is any evidence tending to sustain the cause of action set up in the declaration.

It is insisted by the appellant that the appellee was guilty of contributory negligence in attempting to alight from the train while it was in motion. This court has held in some cases that it is negligence for a passenger to get off a train of which the motive power is steam while the cars are in motion. *Cicero & Proviso Street Railway Co. v. Meixner*, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331. It will generally be found, however, upon an examination of such cases, that the passenger, thus alighting from a steam car when in motion, was aware at the time that it was in motion. In other cases it has been held that the question whether or not the alighting from a steam car which is in motion constitutes of itself contributory negligence is a question of fact, to be determined by the jury, even where the passenger knowingly and intentionally alights from such moving train. Thus, in *Chicago & Alton Railroad Co. v. Byrum*, 153 Ill. 131, 137, 38 N. E. 580, this court said: "Whether or not appellee was guilty of such contributory negligence in alighting from a moving train as would bar a recovery was a question of fact, to be determined by the jury under all the attendant and surrounding circumstances. * * * It was the duty of appellant to stop its train a reasonable length of time at Elkhart to allow appellee, in the exercise of ordinary care and diligence, to alight therefrom with safety, and if appellant failed in this duty, and by reason thereof appellee was injured while in the exercise of ordinary care and caution, appellant would be liable." In *Chicago & Eastern Illinois Railroad Co. v. Storment*, 190 Ill. 42, 46, 60 N. E. 104, 105, it was said: "The main contention of the defendant was that the plaintiff was not entitled to recover at all,

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because the train was in motion when she alighted from the same. This view of the law was erroneous, and the instructions, so far as they announced such erroneous view, were properly modified by the court before being given to the jury." In *Chicago & Alton Railroad Co. v. Gore*, 202 Ill. 188, 192, 66 N. E. 1063, 1064, 95 Am. St. Rep. 224, it was said: "It is so far within the scope of the authority of a conductor of a railway train to advise and direct passengers in the matter of boarding the train that an attempt to step on a moving train in compliance with such advise or direction cannot be declared as matter of law to be negligence that will bar recovery, unless the danger is so open and obvious that only a reckless man would encounter it. * * * Whether or not the appellee, in attempting to get upon the car while the same was in motion on the occasion in question, was guilty of such contributory negligence as would bar a recovery, was a question of fact, to be determined by the jury in view of all the attendant and surrounding circumstances." The considerations which apply to getting on a moving train are also applicable to the matter of getting off a train which is in motion.

Without attempting to distinguish between cases, which seem to hold that it is negligence as matter of law to attempt to alight from the car of a train propelled by steam while it is in motion, and those which hold that the question, whether such attempt constitutes contributory negligence or not is a question of fact for the jury, it is sufficient, for the purposes of the case at bar, to say that, where a passenger alights from a train at a particular point upon the invitation of the conductor, or brakeman, or other employee on board the train, or where such passenger alights from the train under the belief that it is not in motion, and the circumstances show that there is reasonable ground for such belief, then these facts may be taken into consideration by the jury in determining whether the plaintiff has or has not been guilty of contributory negligence. In *Chicago & Alton Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. 901, it was held that the direction, invitation, or assurance of safety, given by a servant of the company, may so qualify a plaintiff's act as to relieve it of the quality of negligence which it would otherwise have; and it was there said: "One who obeys the instructions or directions of another, upon whose assurance he has a right to rely, cannot be charged with contributory negligence at the instance of such other, in an action for injuries received in attempting to follow out the instructions." As was said in *Chicago & Alton Railroad Co. v. Winters*, *supra*, in cases where the facts showed that a passenger dismounted from a train at a place of danger and was injured in so doing, and where it was held that such passenger was not entitled to recover damages for such injuries from the railroad company, it appeared that such movement of the passenger in alighting from the train was not made by any direction or invitation from the conductor of the train or other servant of the company. In 5 American and English Encyclopedia

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of Law (2d Ed.) p. 653, it is said: "The direction of the conductor of a train to an intending passenger as to his method of getting upon the train is clearly within the scope of his authority, and in complying with this direction the passenger is not guilty of negligence, unless he exposes himself to open and apparent danger." The same rule applies as to alighting from a train. *Id.* pp. 657-660; *Chicago & Northwestern Railway Co. v. Scates*, 90 Ill. 586. In *Chicago & Northwestern Railway Co. v. Scates*, *supra*, it was said (page 591): "Where an action was brought to recover for injuries received by a party who attempted to get off a train while in motion, it was held that a passenger has no right to get off a train of cars in motion, and, if he undertakes to do so without the knowledge or direction of any employee of the company, it is at his peril, and he must bear the consequences, however disastrous. * * * If it is to be regarded dangerous for a passenger to get off a train of cars in motion, it is likewise dangerous to get on a train when in motion. If a person is guilty of such negligence in getting off a train of cars in motion as will preclude a recovery for an injury received, upon the same principle and for the same reason a person injured in getting on a train of cars in motion and in consequence thereof should be regarded guilty of such negligence as will prevent a recovery." *Illinois Central Railroad Co. v. Slatton*, 54 Ill. 133, 5 Am. Rep. 109; *Ohio & Mississippi Railway Co. v. Stratton*, 78 Ill. 88; *Illinois Central Railroad Co. v. Chambers*, 71 Ill. 519. On the contrary, the alighting of a passenger from a train thus in motion is not at his peril, if he does so with the knowledge or direction of an employee of the company. There are also cases where the facts show that the party alighting from a moving train had reason to believe that the train had stopped. Where such belief has a reasonable basis in the facts and circumstances surrounding the party at the time of the accident, the act of alighting does not, in and of itself, amount to negligence as matter of law. *Hoehn v. Chicago, Peoria & St. Louis Railway Co.*, 152 Ill. 223, 38 N. E. 549; *England v. Boston & Maine Railroad Co.*, 153 Mass. 490, 27 N. E. 1; *Pittsburg, C., C. & St. L. Ry. Co. v. Miller*, 33 Ind. App. 128, 70 N. E. 1006; *Minock v. Detroit, G. & M. R. Co.*, 97 Mich. 425, 56 N. W. 780.

In the case at bar the appellee, a man 67 years of age, had been traveling for two nights, and was wearied and tired, and so stated to the brakeman when he took his seat in the car, asking the brakeman to awaken him when they reached Flora. There was a railroad crossing before the train arrived in Flora. The train first stopped about 200 feet west of this crossing. Before the crossing was reached the brakeman awoke appellee, and, as he states, announced that the next station was Flora. The depot, where appellee intended to alight, was a considerable distance east of this railroad crossing. Appellee arose from his sleep and from his seat, and put on his overcoat, and took his lunch basket on his arm after the announcement thus made to him by

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the brakeman, and went to the rear platform of the car, where he found the vestibule doors open. He says that the conductor and the brakeman were both standing on the platform of the rear car, next to the one in which he was riding. He says that he asked them where the depot was, and one of them said, pointing to a place directly opposite where they then were, "Right there." His contention is that, in view of what was thus said to him by either the brakeman or the conductor, he thought he had reached the depot and was at the proper place for alighting. The train had stopped at the crossing, and was evidently just moving beyond the crossing, and was at that time a considerable distance west of the depot. In other words, it was not a fact that the depot was "right there," or directly opposite the point where he alighted. There is some conflict in the testimony as to whether the name of the station, Flora, was called after the crossing was passed, or before it was reached. The testimony very strongly tends to show, however, that the name of the station was not called after the first announcement to the appellee when he was awakened from his sleep.

Authorities are produced by the appellant, holding that the fact that the name of a station is called and the further fact that the vestibule doors of the car have been opened do not of themselves constitute an invitation to the passenger to alight. As is said by the Supreme Court of Massachusetts in *England v. Boston & Maine Railroad Co.*, 153 Mass. 490, 27 N. E. 1: "Assuming that the action of the brakeman in calling the station and fastening back the door was to be regarded as an invitation, it was clearly not an invitation to alight from a moving train, but from the train after it had come to a stop." In the present case, if there had been nothing more than the calling of the name of the station, or the fastening back of the vestibule doors, it could not be said that appellee was invited by any employee of the company to alight at that place. But when these circumstances are taken into consideration in connection with the fact that the appellee was told, when he went on the platform, by the conductor or the brakeman, that the depot where he had to alight was "right there" at the place where he then was, and in connection with the further facts that it was a dark night and had been raining, and that appellee, wearied and worn with long journeying, had just awakened from sleep at the early hour of 4 o'clock in the morning in the month of November, it cannot be said that it was error to submit to the jury, as a question of fact, whether or not the appellee was guilty of contributory negligence in attempting to alight at the point where he did alight. Whether there was light enough from a restaurant, or other places near by, to enable appellee to see whether the train was moving or not, and where he was stepping when he alighted, was a question of fact submitted to the jury under the instructions.

In *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631, it was held that in case the conductor announces a station at which his train

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is not bound to stop, just before the same is reached, and if, following such announcement, the train actually does stop at the station platform, a passenger for such station would be justified in presuming it was for the purpose of discharging him there, and in proceeding to get off, and if, while it is so stopped and with due promptness and care, the passenger attempts to get off, and is thrown down and injured by the starting up of the train, that presumption would become conclusive on the company, and that where the ordinary signal is given on approaching a station, and it is announced in the usual manner by the brakeman or conductor, so as to lead a passenger to believe the train was going to stop at such station, and it does stop there, the company cannot avoid liability to the passenger for an injury caused by the train starting before he has time to get off by showing those in charge of the train intended to go on further before discharging passengers, of which no notice was given. In the case at bar, if notice was given to the appellee that the next station at which the car would stop was Flora, and, after such notice was given, the car did actually stop at the crossing in question before the depot was reached, the appellee had a right to suppose that the stoppage of the car was at the proper place for him to get off. The evidence tends to show that the appellee had no knowledge that the train would stop at a railroad crossing before it reached the depot, and then, after such stoppage, would move on again and stop at the depot.

In *Chicago & Alton Railroad Co. v. Arnol*, 144 Ill. 261, 268, 33 N. E. 204, 205, 19 L. R. A. 313, it was said by this court as follows: "In this country it is the most universal practice to announce the station which the train is approaching before it is reached, and while the train is still in motion; and it is universally understood that such announcement is intended as notice to passengers, without warning to the contrary, that the next stop of the train will be at the station announced. The purpose is understood to be to enable passengers intending to alight at that station to be ready to leave the cars promptly, without undue haste or inconvenience to themselves or unnecessary delay of the train. * * * If the conduct of appellant's servants and their management of the train amounted to an invitation to then alight, and would be so understood and acted upon by reasonable and prudent persons, and appellee, acting in good faith upon such invitation, arose, upon the train coming to a standstill, for that purpose, the jury would be justified in finding that she was in the exercise of ordinary care for her own safety. If she, by reason of such apparent invitation, was placed in peril from the farther movement of the train, the duty at once arose on the part of appellant to stop its train a sufficient length of time to permit her to leave it in safety, or to warn her of the danger in time to avert injury. * * * The duty of the carrier was to be measured by the peril to the passenger, whom it had accepted and undertaken to safely carry, and who had been induced by the conduct of its servants to assume a position of danger." In

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Ward v. Chicago & Northwestern Railway Co., 165 Ill. 462, 46 N. E. 365, it was held that a railroad company, having provided its stations with platforms, must use due care in stopping its coaches, so as to afford passengers an opportunity to safely alight thereon, particularly after its servants have announced that the next stop would be at a station; and it was also there held that a railroad passenger, who is justified by the conduct of the servants of the road in alighting from a train, and who, while exercising due care, is injured by reason of the carrier's negligence in omitting to provide a safe place to alight, may recover for the injuries so received.

There is a direct conflict between the testimony of the appellee and the testimony of the conductor and brakeman as to what occurred just before the appellee alighted from the train. The conductor and brakeman deny that they were present and saw the appellee when he alighted. They also deny that they heard him ask where the depot was, and deny that they pointed to the place opposite where he was, and said to him, in answer to his question, "Right there." The accident occurred at about 4:35 in the morning. At 1 o'clock of the same day agents or employees of the appellant went to the appellee, while he was yet suffering from his injury and sitting upon the edge of his bed, and asked him to make a written statement as to how the accident occurred. A stenographer took down his statement, and wrote it up, and about 3 o'clock in the afternoon of that day it was presented to him and signed by him in the presence of two witnesses. This statement was introduced in evidence upon the trial of the case by the appellant, and not by the appellee. In this statement appellee says: "In the first place I was laying down in the train trying to sleep. I asked the conductor to wake me up when I reached Flora. I told him I did not sleep any last two nights. When I got there, he woke me up, and I got on my overcoat in a hurry, and picked up my lunch basket. I followed out of the car the brakeman and conductor at the rear end of car. I asked the brakeman standing right there, as I went through the coach, and when I had hold of the handles going down the steps, 'Where is the depot?' He said, 'Right there.' I also saw the conductor at the same time. He was not far from the end of the car. I started to go down the steps. I thought the train was stopped, as I could not feel any jar. I was going down the steps, when on the last step I stepped to the ground, or aimed to step there. The first thing I knew I was struck somewhere. I was close up to the rail, and tried to get away from it. I had enough sense to try to get away from it. I was sensible all the time. I tried to get up, but could not. When I got up, I saw that my hand was torn and mashed, and grabbed it with my other hand. I hold the company at fault, as the conductor ought to have told me that the train had not stopped when he saw me going down the steps. As I fell, I heard some one holler, 'The train caught him.' I think I heard some one holler; whether it

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was the brakeman or conductor I could not tell. I hold the company at fault, as I was in a strange place, and they ought to have hollered or not let me go." This statement, thus made a few hours after the accident happened, was a part of the appellant's own evidence. This statement confirms the testimony of the appellee, as given upon the trial of the cause. In *American Hoist & Derrick Co. v. Hall*, 208 Ill. 597, 70 N. E. 581, it was said: "Appellant voluntarily put appellee upon the witness stand, and made him its own witness, thereby vouching for his credibility, and, while it is true it was not bound by his conclusions, and might contradict him by other witnesses, yet it could not impeach him." *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. 109; *Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486. In view of the introduction of this statement confirming the testimony of the appellee, it cannot be said that there was not evidence justifying the jury in coming to the conclusion that the appellee was induced to alight by the invitation of the appellant's employees, and that he had reasonable ground for believing that he was at the proper place for alighting.

As to the question of the negligence of the appellant, it is clear that if the conductor or the brakeman, or both of them, stood on the platform and permitted the appellee to alight at the hour and under the circumstances already stated, and induced him to believe that he was alighting at the depot, then the company was certainly guilty of such negligence as authorizes a recovery against it. The appellee was a passenger upon the appellant's train, and the implied contract with him to carry him safely necessarily included the furnishing of reasonable opportunity to alight from the train safely at the end of his journey. *Chicago & Alton Railroad Co. v. Arnol*, *supra*.

Much criticism is made by appellant's counsel upon the instructions given for the appellee, upon the modification of instructions asked by appellant and the giving of such instructions as modified, and upon the refusal of certain instructions asked by the appellant. It would swell this opinion to an inordinate length to attempt to discuss all these criticisms in regard to the instructions. We have examined them all carefully, and are of the opinion that those given announced views in accordance with the principles hereinbefore discussed, and those refused announced views in opposition to the rules here announced. This being so, there was no such error in the giving, modification, or refusal of instructions as to justify a reversal of the case.

Complaint is made of some of the remarks made by counsel for appellee in his argument to the jury. Upon this subject we concur in the following view, expressed by the Appellate Court in their opinion deciding this case, to wit: "It is urged that the judgment should be reversed because of improper remarks of counsel for appellee in their opening statement and closing argument. While a number of remarks referred to were more or less objectionable and improper, we do not think they were so se-

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riously so as to have affected the verdict. Objections to most of them were sustained by the trial judge, who afterwards approved the verdict."

The judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

Judgment affirmed.

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(Supreme Court of Illinois, Oct. 24, 1905.)

[75 N. E. Rep. 457.]

Carriers—Passengers—Shippers of Stock.*—A shipper of stock, who by his contract of shipment is entitled to free transportation, but is required to ride in the caboose when the train is in motion, is a passenger, but must ride in the caboose.

Same—Authority of Conductor—Waiver of Contract Provisions.†—Where a contract for the shipment of stock entitled the shipper to free transportation in the caboose, the conductor of the train had no implied authority, irrespective of circumstances, to invite the shipper to ride on the engine.

Same—Waiver of Contract—Question for Jury.—Where a conductor had no express authority to waive a provision of a shipper's contract requiring him to ride in the caboose, or to invite persons to ride on the engine, the question whether the conductor's invitation to a shipper to ride on the engine was a waiver of the provision of the contract requiring him to ride in the caboose was one of fact for the jury.

Same—Establishment of Waiver.†—In order to establish a waiver by a conductor of a provision in a contract for the shipment of stock

*For the authorities in this series on the question who are, and are not, passengers, see foot-notes appended to *Quantz v. Southern Ry. Co.* (N. Car.), 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259; *Fremont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Garvey v. Rhode Island Co.* (R. I.), 15 R. R. R. 30, 38 Am. & Eng. R. Cas., N. S., 30; *Dallas Rapid Transit Co. v. Payne* (Tex.), 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25; *Holmes v. Birmingham Southern R. Co.* (Ala.), 14 R. R. R. 815, 37 Am. & Eng. R. Cas., N. S., 815; foot-notes appended to *Anderson v. Seattle-Tacoma, etc., Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380; *Birmingham Ry., etc., Co. v. Bynum* (Ala.), 13 R. R. R. 683, 36 Am. & Eng. R. Cas., N. S., 683; *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; *McNeill v. Durham & C. R. Co.* (N. Car.), 13 R. R. R. 647, 36 Am. & Eng. R. Cas., N. S., 647; *Foster v. Seattle Elec. Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640; *Hudson v. Lynn & B. R. Co.* (Mass.), 13 R. R. R. 622, 36 Am. & Eng. R. Cas., N. S., 622.

†For the authorities in this series on the question whether a conductor has implied authority to waive any of the conditions of a contract for the carriage of a passenger, see *Ft. Wayne Traction Co. v. Hardendorf* (Ind.), 15 R. R. R. 738, 38 Am. & Eng. R. Cas., N. S., 738 (authority of conductor to permit passenger to ride on running board was question for jury); *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153 (authority of conductor to allow person to ride, as a passenger, on engine);

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requiring the shipper to ride in the caboose, the shipper must affirmatively show, in the absence of evidence of express authority on the part of the conductor to waive such provision, that such action was within the apparent scope of the conductor's authority, and that the shipper did not know or have reasonable ground to believe that the conductor was exceeding his authority.

Appeal from Appellate Court, Fourth District.

Action by Frank E. Jennings against the Illinois Central Railroad Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Reversed.

W. W. Barr and *R. J. Stephens* (*J. M. Dickinson*, of counsel), for appellant.

W. F. Bundy and *Frank F. Noleman* (*C. E. Jennings*, of counsel), for appellee.

CARTWRIGHT, C. J. This suit was brought by appellee in the circuit court of Marion county against appellant to recover damages for personal injuries suffered in falling from an engine. The jury returned a verdict of guilty, and assessed the appellee's damages at \$5,000. Judgment was entered on the verdict, and on appeal to the Appellate Court for the Fourth District the judgment was affirmed.

The amended declaration contained three counts, which averred that plaintiff was engaged in the business of buying, selling, and shipping live stock; that on November 20, 1900, he shipped a car load of cattle on defendant's railroad from Centralia to Assumption, Ill.; that it was necessary for him to accompany the cattle for the purpose of watching over and caring for them; that the defendant, in consideration thereof and the payment of freight, issued to him a drover's pass, which entitled him to ride on the freight train; that he was invited and directed by the conductor to ride on the locomotive engine; and that, while so riding on the engine and exercising due care and caution for his own safety, he lost his balance, was thrown and fell from the engine cab through an open window, and was injured. The ground for charging defendant with liability, which was alleged in the first count, was that, while the train was stopped about two miles south of the station at Pana for the purpose of sup-

notes, 17 Am. & Eng. R. Cas., N. S., 431, 20 Am. & Eng. R. Cas., N. S., 431 (authority of conductor to waive rules and regulations); note, 17 Am. & Eng. R. Cas., N. S., 657 (authority of conductor to waive conditions in tickets as to stamping tickets and identification of passengers); note, 20 Am. & Eng. R. Cas., N. S., 440 (authority of conductor to waive condition as to expiration of ticket); *International & G. A. R. Co. v. Best* (Tex.), 17 Am. & Eng. R. Cas., N. S., 153 (authority of conductor to grant stop-over privileges); *Thompson v. Truesdale* (Minn.), 2 Am. & Eng. R. Cas., N. S., 105 (authority to waive condition against detachment of coupons from commutation tickets by passenger); *New York & New England R. Co. v. Feely* (Mass.), 2 Am. & Eng. R. Cas., N. S., 103 (how far conductor's acceptance of season ticket on a certain trip is waiver of right to fare for subsequent like trip).

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plying the locomotive with water from a tank, plaintiff was invited by defendant's conductor in charge of the train to ride to the city of Pana upon the engine; that it was nighttime and there were no lights upon the engine, and plaintiff was unfamiliar with the construction of the interior of the cab; and that, in endeavoring to secure a safe place upon the seat at the side of the engine, he was thrown out of the cab window by reason of the window being left open through carelessness and negligence of defendant's servants. In the second count it was charged that the conductor carelessly and negligently invited, ordered, and directed the plaintiff to take a place upon the engine; that the place in the engine where he was ordered to ride was extremely hazardous, upon a seat at one side of the cab by an open window; that he was unfamiliar with the position, and the cab was not well lighted; and that by reason of the darkness and the motion of the engine and the open window he lost his balance, was thrown, and fell out. The third count charged as negligence that the conductor notified and directed plaintiff to ride upon the engine; that, relying upon the invitation, he left the caboose and mounted the engine, taking a position in the gangway; that while standing in the gangway between the engine and tender the fireman, willfully and wantonly disregarding his safety, ordered him to a seat on the side of the cab; that the cab was not well lighted; and that in endeavoring to take his seat he fell and was thrown off upon the track.

It was proved at the trial that plaintiff was a stockman and shipped a car of cattle, as alleged in the declaration, in pursuance of a shipping contract signed by him, which provided that the car containing his stock should be in his charge while in transit; that he should feed, water, and take care of the stock at regular stopping stations and while the train was not in motion; and that he should be entitled to free transportation, and should, while the train was in motion, ride in the caboose. There were from 26 to 29 cars in the train, and plaintiff's stock was next the engine. It was dark and stormy, and about 12 o'clock in the night the train stopped about 2 miles south of Pana near a water tank. The engine was detached from the train, and was run forward to the tank and supplied with water, and then returned and attached to the train. Plaintiff had been riding in the caboose, and when the train stopped he got off and followed the conductor to the front car to look at his cattle. When the train was ready to start the conductor told him to get on the engine and ride to Pana. He did so, and stood on the gangway in front of the door of the firebox. The fireman could not do his work while the plaintiff was standing there, and when the fireman proceeded to put coal on the fire he told plaintiff to go in and sit on his seat. The fireman's seat ran along the left-hand side of the cab and was about 25 inches above the floor. There was an arm rest running along the window about 13 or 14 inches above the seat and 3 or 4 inches above the window sill. There was a

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double window on that side, and one part of it was open. The conductor was on the engineer's side of the cab, and the train was running very slowly, at 4 to 6 miles an hour. Plaintiff attempted to take the seat as directed, and in some unexplained manner fell out of the window, about 150 feet from the tank. According to his testimony, he took something to be a step or steps, and there was evidence tending to show that in attempting to get up on the seat he stepped on it and tried to sit on the arm rest along the window and fell out. There were two small lamps in the cab with painted sides, so as to throw light on the steam gauge and water glass. Too much light in the engine would interfere with the engineer and fireman in looking outside and tend to prevent keeping a proper lookout, so that the cab was necessarily somewhat dark. There was no evidence tending to prove any fault or defect in the engine or the management of it, or in the track, the rate of speed, or otherwise. One side window was usually kept open for ventilation and lookout purposes, and the arm rest, which was good protection, was 13 or 14 inches above the seat, so that there was no negligence in the window being open. When plaintiff was standing on the gangway in front of the firebox, the fireman could not perform his duties, so that it was necessary the plaintiff should take some other position in order that the train might be kept in motion. The fireman made no pretense of authority over the plaintiff, and directed him to a place which was apparently safer than the one he occupied. About a quarter of a mile from the tank the absence of the plaintiff was noticed, and it was thought that perhaps he had got off for some purpose. When the storm was over, the men went back and found him lying by the track with his leg broken.

The only questions in the case were whether the invitation or direction of the conductor to ride on the locomotive engine was negligence and improper, whether it had the effect of waiving the condition of the contract that plaintiff should ride in the caboose, and whether plaintiff was guilty of negligence by complying with the invitation or order in attempting to ride on the engine. The contract, which was signed by the defendant's agent and by the plaintiff, provided that he should be entitled to free transportation, and should, while the train was in motion, ride in the caboose of the train conveying his stock. Plaintiff was a passenger (*Chicago & Alton Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. 901); but the contract that he should ride in the caboose while the train was in motion was valid and binding upon the parties (3 Thompson on Negligence, § 2911), and the defendant was entitled to the benefit of it, unless the conductor had power to waive the condition and did so. A principal is liable for the acts of his agent within the scope of the agent's authority, either express or implied; but beyond the scope of his authority or duty a conductor or other agent cannot bind his principal. There was no evidence tending to prove that the conductor, as between the defendant and himself, was authorized to waive the benefit of the contract; but if, under all the circum-

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stances, the act of the conductor was within the apparent scope of his authority, and plaintiff did not know of any limitation upon such authority, the defendant would be bound. It rested upon the plaintiff to affirmatively show that it was within the apparent scope of the authority of the conductor to waive the benefit of the contract, and that he did not know or have reasonable grounds to believe that the conductor was exceeding his authority. If the act was within the apparent scope of the authority of the conductor, plaintiff was not bound as a matter of law to stop and inquire as to such authority; but if he knew, or ought to have known, that the conductor was exceeding his authority, the invitation or order would not amount to a waiver. These questions were to be determined from all the facts and circumstances proved on the trial. The court took the questions from the jury by two instructions, which assumed to state as a matter of law that the conductor was authorized to abrogate the contract between the plaintiff and the defendant and waive the condition inserted in it for the benefit of the defendant. The first instruction, given at the request of the plaintiff, advised the jury that, although the contract contained the provision that plaintiff should, while the train was in motion, ride in the caboose, yet if he was invited by the conductor to leave the caboose in which he was riding, and to ride upon the engine for the purpose of looking after his stock, the provision in the contract would not prevent a recovery in the case. The third instruction, given at the instance of plaintiff, was as follows: "If the jury believe, from a preponderance of the evidence, that the conductor in charge of the train in question invited or requested the plaintiff to leave the caboose and go forward and ride on the engine, such action would bind the defendant company, and would have the effect of waiving the provision of the contract in evidence in regard to riding on the caboose while the train was in motion."

The question what acts are within the scope of the authority of an agent is ordinarily one of fact. If the authority is conferred by a writing, it may be construed by the court as a matter of law, and perhaps, where the authority is established by usage so common and general as to be known to every one, a court would not err in stating to the jury that an act was within the scope of such authority. Doubtless as to many acts the authority of a conductor in the management of a train and dealing with the traveling public is so well established that there could be no dispute as to their being within the scope of his authority, but certainly the invitation or order of the conductor in this case was not of that character. No one would say that conductors have a general authority to allow passengers to ride on engines or other parts of trains not designated for the reception or accommodation of passengers, or that under ordinary circumstances it would be supposed that they have such power. It is said in 3 Thompson on Negligence, § 2943, that the presence of a passenger on an engine will constitute negligence as a matter of law,

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for the reason that the engine is not designed for carrying passengers, and is so obviously dangerous that his presence there will preclude him from damages, either with or without the invitation of the conductor or engineer. In 4 Elliott on Railroads § 1632, it is said that under ordinary circumstances an employee has no implied authority to receive passengers on an engine, and that such an act as riding on an engine is so obviously dangerous that, except in case of an emergency a passenger cannot do so even with the consent of the conductor, and hold the company liable.

There may be exceptional circumstances or an emergency under which, as a matter of fact, a shipper in charge of his stock may suppose that the conductor, or even an engineer or other employee, has authority to permit him to ride upon an engine. The case of *Lake Shore & Michigan Southern Railroad Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510, was of that character. Brown, a stockman, shipped a carload of his stock to the Union Stockyards in Chicago and rode in a caboose to the railroad company's yards at that city. There was a custom to pass shippers of live stock from that point to the stockyards without pay, but there was no evidence of any contract as to whether Brown was to be carried. The caboose was detached from the train and put on another train, and a switch engine was attached to the car containing Brown's stock to take it to the stockyards. Brown had a right to accompany his stock and to be carried by the railroad company, and was compelled to ride upon the switch engine, as directed by the engineer. Through negligence in making a running switch he was thrown off and received injuries from which he died. The question was left to the jury to say, as a matter of fact, whether, under the instructions given, Brown was rightfully on the engine; and it was held, under the circumstances of the case, that he might have supposed that those in charge of the engine and car of stock had authority to direct him to ride upon the engine, and that it would not be proper for the court to instruct the jury as a matter of law that he was wrongfully there. In that case there was no contract to the place where the shipper should ride and no caboose in which he could ride, and the question of authority was treated as one of fact. It was held that, if those in charge of the car invited the shipper to ride upon the engine, they must operate the train with due regard to his safety and were responsible for any negligence in making a flying switch. This case is entirely unlike that one, for the reasons that there was a caboose in which the plaintiff had a right to ride, a contract by which he was to be carried in the caboose, and no negligence, either alleged or proved, in the management or operation of the train. It is clear that the law lays down no rule that under the circumstances of this case the conductor had a right to waive the stipulations of the contract, and therefore the court misdirected the jury as to the law.

The second instruction, given at the request of the plaintiff, recited the ordinary duties of carriers of passengers and was

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applicable to the case. It ignored the contract and the entire question of the authority of the conductor to invite or direct the plaintiff to ride on the engine.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

SOUTHERN RY. CO. IN KENTUCKY v. HAWKINS.

(Court of Appeals of Kentucky, Nov. 9, 1905.)

[83 S. W. Rep. 258.]

Carriers—Passengers—Expulsion by Conductor—Character of Act.*

—Where a conductor, to whom a ticket is presented by a passenger, believes it to be his duty to reject the ticket because of its invalidity for travel on the date on which it is presented, and the passenger fails to pay the fare demanded of him, the conductor is not guilty of a tort in expelling the passenger from the train, unless he accompanies such expulsion with unreasonable or unnecessary force or insult.

Same—Pleading—Variance.—A petition alleged the purchase of a ticket by plaintiff which entitled him to ride on defendant's train, and that defendant's conductor willfully, wrongfully, and in violation of plaintiff's rights as a passenger forced him to leave the train. The evidence showed the purchase of the ticket as alleged, but that, through the negligence of the ticket agent or of a prior conductor than the one who ejected plaintiff, it was so punched as to render it valueless for use at the time that plaintiff was ejected. Held, that since the cause of action as set up in the petition was in contract, and not in tort, there was no fatal variance between the proof and petition.

Same—Expulsion of Passenger—Damages—Pleading.—In an action for expulsion of a passenger from the train, there can be no recovery for loss of time or expense incurred, in the absence of appropriate pleading and proof.

Same—Punitive Damages.*—Where a conductor, in ejecting a passenger from the train because of the apparent invalidity of his ticket, does not act in a rough or unkind manner, and does not apply to him force or threats, or even place his hand upon him except to assist him down the car steps, punitive damages cannot be recovered against the railroad.

Damages—Exemplary Damages—Question for Court.—Whether there is any evidence in a given case to justify the assessment by the jury of exemplary damages is for the determination of the court.

*For the authorities in this series on the question when, and when not, punitive or exemplary damages can be recovered against a carrier for wrongs to its passengers, see foot-notes appended to *Peterson v. Middlesex, etc., Co.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672; *Dagnall v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 59, 38 Am. & Eng. R. Cas., N. S., 59; foot-notes appended to *Southern Ry. Co. v. Lanning* (Miss.), 15 R. R. R. 1, 38 Am. & Eng. R. Cas., N. S., 1; *Pickett v. Southern Ry. Co.* (S. Car.), 14 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48; *Northern Cent. Ry. Co. v. Newman* (Md.), 10 R. R. R. 525, 33 Am. & Eng. R. Cas., N. S., 525.

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SOUTHERN RY. CO. IN KENTUCKY v. HAWKINS.

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Carriers—Passengers—Expulsion by Conductor—Character of Act.*

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Same—Pleading—Variance.—A petition alleged the purchase of a ticket by plaintiff which entitled him to ride on defendant's train, and that defendant's conductor willfully, wrongfully, and in violation of plaintiff's rights as a passenger forced him to leave the train. The evidence showed the purchase of the ticket as alleged, but that, through the negligence of the ticket agent or of a prior conductor than the one who ejected plaintiff, it was so punched as to render it valueless for use at the time that plaintiff was ejected. Held, that since the cause of action as set up in the petition was in contract, and not in tort, there was no fatal variance between the proof and petition.

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Same—Punitive Damages.*—Where a conductor, in ejecting a passenger from the train because of the apparent invalidity of his ticket, does not act in a rough or unkind manner, and does not apply to him force or threats, or even place his hand upon him except to assist him down the car steps, punitive damages cannot be recovered against the railroad.

Damages—Exemplary Damages—Question for Court.—Whether there is any evidence in a given case to justify the assessment by the jury of exemplary damages is for the determination of the court.

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Carriers—Excessive Verdicts.†—In an action against a carrier for the ejection of a passenger because of the apparent invalidity of his ticket, where the evidence showed that the conductor did not act roughly or unkindly, and the ejection took place about a mile from the town at which plaintiff got on the train, and merely obliged him to walk back to the town and remain there until the next day, a verdict for \$1,000 was grossly excessive.

Same—Evidence—Declarations of Fellow Passengers.—In an action against a carrier for the wrongful ejection of a passenger, declarations of passengers in the car that plaintiff was a "beat and bum," made as he walked out of the car behind the conductor, were incompetent.

Appeal from Circuit Court, Mercer County.

"To be officially reported."

Action by W. A. Hawkins, by his next friend, against the Southern Railway Company in Kentucky. From a judgment for plaintiff, defendant appeals. Reversed.

E. H. Gaither and Humphrey, Hines & Humphrey, for appellant.

W. C. Bell and Robt. Harding, for appellee.

SETTLE, J. The appellee, W. A. Hawkins, 20 years of age, by D. B. Hawkins, his next friend, sued the appellant railroad company for his alleged wrongful ejection by the conductor from one of its passenger trains upon which he was attempting to ride from Harrodsburg to McBrayer, a distance of about 15 miles. The facts alleged in the petition as constituting his cause of action are that on Sunday evening, September 14, 1902, he purchased of appellant's ticket agent at McBrayer, and paid for, a round-trip ticket which entitled him to ride as a passenger on appellant's passenger train from McBrayer to Harrodsburg on the evening of that day, and to return on another of its trains from Harrodsburg to McBrayer on the following day, September 15th; that he did on the night of the 14th ride on appellant's passenger train from McBrayer to Harrodsburg, and on the afternoon of the following day got aboard of another of its passenger trains at Harrodsburg with the intention of returning to McBrayer, but upon reaching a point about one mile from Harrodsburg appellant's conductor in charge of the train willfully, unlawfully, wrongfully, and in violation of his rights as a

†For the authorities in this series on the subject of the damages recoverable for refusal or failure to carry a passenger, see foot-note appended to *Louisville, etc., Ry. Co. v. Covetts* (Ky.), 15 R. R. R. 63, 38 Am. & Eng. R. Cas., N. S., 63; foot-note appended to *Miller v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 33, 38 Am. & Eng. R. Cas., N. S., 33; *Southern Ry. Co. v. Lanning* (Miss.), 15 R. R. R. 1, 38 Am. & Eng. R. Cas., N. S., 1; *Cain v. Louisville & N. R. Co.* (Ky.), 14 R. R. R. 376, 37 Am. & Eng. R. Cas., N. S., 376.

For the authorities in this series on the question of the right to recover for the humiliation and other mental suffering of a wrongfully ejected passenger, see foot-note appended to *Georgia Ry. & Electric Co. v. Baker* (Ga.), 13 R. R. R. 259, 36 Am. & Eng. R. Cas., N. S., 259.

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passenger forced and required him to leave the train, whereby he was compelled to walk back to Harrodsburg and there remain until the next day; that his ejection from the train was effected in the presence of other passengers and caused him great humiliation of feeling, subjecting him to annoyance and inconvenience, by all which he was damaged in the sum of \$2,000. The appellant's answer contained a traverse of the averments of the petition. Upon the trial of the case appellee recovered a verdict and judgment for \$1,000. A new trial was sought, and a reversal is now asked, by appellant upon three grounds: (1) That the learned special judge should have given the jury a peremptory instruction to find for appellant; (2) that he erred in instructing the jury; (3) that the verdict is excessive.

It is insisted for appellant that it was entitled to the peremptory instruction, because the petition sought to recover for the alleged wrongful ejection of appellee from appellant's train, whereas he was properly put off the train by the conductor because his right to ride thereon was limited by his ticket, through the mistake of the agent who issued it, to September 14th, the day of its purchase, and did not entitle him to be carried on its train on the 15th, and that, as there was no violence or unnecessary force used by the conductor in ejecting him from the train, he should have sued appellant for breach of contract growing out of the negligence or mistake of the ticket agent, and not in tort for being put off the train. We are aware it was held by this court in *L. & E. Ry. Co. v. Lyons*, 20 Ky. Law Rep. 516, 46 S. W. 209, that the "ticket of the passenger must usually be treated as conclusive evidence of the passenger's rights as between him and the conductor, leaving the passenger to his action against the carrier if he has not been given such a ticket as the contract called for; otherwise, the conductor would be compelled to accept the statements of the passenger in reference to and contradictory of the ticket presented to and relied on by him." But it was also held in the same case that, where the ticket does not purport to be and is not the complete agreement between the carrier and the passenger, supplementary evidence is competent to show what was the real contract indicated by the ticket. In the case at bar it must be taken as true, because so testified by appellee and not contradicted, that he ordered of appellant's ticket agent at McBrayer and paid for a ticket which entitled him to be carried as a passenger on appellant's railroad from that place to Harrodsburg on Sunday, September 14th, and to be returned from the latter city to McBrayer on Monday, the 15th, though he did not examine the ticket while in his possession to see that it in terms conformed to the contract. It is also true that the ticket agent knew when he sold appellee the ticket that it was to be used on the train that night, and that there would be no other upon which he could that day return to McBrayer. It is likewise true that the ticket, when presented to appellant's conductor by appellee on Monday, September 15th, showed that it was not good after the 14th, as the conductor told him; but it does not

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satisfactorily appear from the evidence whether the punch mark on the return part of the ticket, showing it expired on the 14th, was made by the ticket agent when he sold and delivered it to appellee, or by the conductor in charge of the train on which appellee went to Harrodsburg on that day. In other words, it does not appear whether the negligence of the ticket agent or that of the first conductor rendered the ticket valueless for the use on the 15th. It was the act of one of them, and both were the agents of appellant.

Be that as it may, it is manifest that the conductor to whom it was presented by appellee after leaving Harrodsburg believed it to be his duty to reject it; and, as appellee failed to pay the fare demanded of him, his expulsion by the conductor from the train was not tortious, unless accompanied with unreasonable and unnecessary force or insult. We may say of this case, as was said in *L. & E. Ry. Co. v. Lyons*, supra: "Although it is alleged in the petition that the conductor wrongfully, maliciously, and to the humiliation of appellee ejected him from the train, the action is essentially and in form *ex contractu*, and the recovery, if any, must necessarily be limited to compensatory damages." Accepting this view of the case, we do not think there was such a variance between the proof and cause of action set forth in the petition as would have authorized the giving of the peremptory instruction asked by appellant.

We are further advised by the opinion of the case, supra, that for wrongful ejection from a train without force or violence the compensatory damages that may be recovered will embrace mortification and humiliation of feeling, as well as any inconvenience, loss of time, and such necessary expense, by way of additional railroad fare, as may result from the ejection; but, as neither loss of time or expense was alleged or proven in this case, there can be no recovery as to either of these items. The instructions of the trial judge should have confined the recovery to compensatory damages.

Appellee, W. A. Hawkins, and his uncle, J. C. Bond, furnished all the testimony given in this case, and the latter testified only as to the condition of the former when he returned to his (Bond's) home in Harrodsburg after being ejected from the train. According to appellee's testimony he was expelled from the train about a mile from Harrodsburg, to which place he immediately returned. When on the train he was approached by the conductor for his ticket. Appellee handed him his ticket, and thereupon the following conversation occurred between them, which we give in appellee's own words: "The conductor looked at it [the ticket] and said it was no good; that I could not ride on that. I asked him why, and he said the ticket wasn't any good. I told him I got it the evening before and paid full fare for it. He still said it was no account, and I would have to pay my fare or get off. I told him I couldn't pay my fare; that I didn't have any money. He said there wasn't any use in talking about it,

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and he pulled the bell cord and stopped the train. He walked in front of me, and when we got to the step he took me by the arm until I got down the steps. He did not get off the train. He helped me down to the bottom step; it seemed to me in a pretty rough way. He held me tolerable tight, but did not hurt me." It will be observed that the conductor was neither offensive nor insulting to appellee, he applied to him neither force nor threats, and did not even place his hand upon him, except to assist him down the car steps. It is true the witness thought he helped him down the steps in a pretty rough way; yet, when he describes his manner and explains what he did, it is apparent that he was neither rough nor unkind. It is patent, therefore, that the conduct of the conductor was not such as to manifest a wanton or reckless disregard of appellee's rights or a disposition to oppress or humiliate him. What he said and did gave no cause for the infliction of punitive damages upon his employer. Therefore the instruction as to punitive damages should not have been given. It seems to be well settled that whether there is any evidence in a given case to justify the assessment by the jury of exemplary damages is for the determination of the court. *Sedgwick on Damages*, § 387; *McHenry Coal Co. v. Sneddon*, 98 Ky. 686, 34 S. W. 228; *Lex. Ry. Co. v. Fain*, 25 Ky. Law Rep. 2243, 80 S. W. 463.

The verdict of \$1,000 returned by the jury was flagrantly excessive, because far beyond the maximum of just compensation. It can be explained only upon the ground that it resulted from passion or prejudice on the part of the jury. An examination of the following cases, strikingly like the one at bar, but some of which represent greater wrongs to the plaintiffs therein are here shown, will manifest the uniform purpose of this court to limit the recovery in this class of cases to compensatory damages, where the elements of unnecessary force and oppression are wanting: *M. & O. R. R. Co. v. Reeves*, 25 Ky. Law Rep. 2239, 80 S. W. 471; *Ky. Central R. R. Co. v. Biddle*, 17 Ky. Law Rep. 1363, 34 S. W. 904; *L. & N. R. R. Co. v. Jackson*, 18 Ky. Law Rep. 296, 36 S. W. 173; *L. & E. Ry. Co. v. Lyons*, 20 Ky. Law Rep. 516, 46 S. W. 209; *Strull v. L. & N. R. R. Co.*, 25 Ky. Law Rep. 678, 76 S. W. 181; *L. & N. R. R. Co. v. Champion*, 24 Ky. Law Rep. 87, 68 S. W. 143.

We think the declarations of passengers in the car that appellee was a "beat and bum," to which they, according to appellee's testimony, gave voice as he walked out of the car behind the conductor, were clearly incompetent, and should, therefore, have been excluded from the jury. *L. & N. R. R. Co. v. Simpson*, 111 Ky. 754, 64 S. W. 733, 3 R. R. R. 513, 26 Am. & Eng. R. Cas., N. S., 513.

Except to the extent that they authorized the jury to allow punitive damages, we think the instructions reasonably correct; but for the errors indicated the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

SOUTHERN RY. CO. v. WEBB.**WEBB v. SOUTHERN RY. CO.**

(Supreme Court of Alabama, April 19, 1905.)

[39 So. Rep. 262.]

Carriers—Special Contract—Breach—Pleading.—Where, in an action against a carrier for breach of a contract for the transportation of hogs, plaintiff's first count in his complaint was in the Code form, he was entitled to recover thereon, though the evidence showed that the shipment was made under bills of lading containing special stipulations.

Same—Decreased Weight.—In an action against a carrier for breach of a contract for the shipment of certain hogs, which defendant failed to deliver according to the contract, plaintiff was entitled to recover damages, resulting from their decreased weight and their decreased market value during their detention, under a count in the complaint in the Code form, in the absence of a stipulation in the contract for a different measure of damages.

Same—Bill of Lading—Alteration—Special Agent—Action.*—Plaintiff having directed defendant's agent as to the consignees of certain hogs, a contract of affreightment was executed naming such persons as consignees. Plaintiff directed his servant to drive the hogs to the place of shipment and put them into the car, which had been previously ordered, and such servant, without any authority, directed the words "Union Stockyards" to be written on the waybill in pencil under the names of the consignees, whereupon the hogs were delivered to the stockyards company. Held, that defendant was not authorized to make such delivery, and that the same constituted a conversion of the hogs.

Same—Contract—Construction.—Failure of a shipper to accompany his hogs and unload them on arrival at destination, as provided by the contract of affreightment, did not relieve the carrier from liability for misdelivery.

Same—Detention—Lien.—Where a carrier instead of delivering certain hogs to the consignees, delivered them to a stockyards company, and thereby converted them, it was immaterial to the carrier's

*For the authorities in this series on the duty of the carrier to deliver freight to the party entitled to receive it, see foot-note appended to *National Newark Banking Co. v. Delaware, L. & W. R. Co.* (N. J.), 12 R. R. R. 745, 35 Am. & Eng. R. Cas., N. S., 745.

For the authorities in this series on the question as to what constitutes conversion of freight by the carrier, see *Ryland & Rankin v. Chesapeake & O. Ry. Co.* (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279 (carrier can not be charged with conversion of freight, on account of delay in delivering, if it is safely kept, unless there has been demand for and refusal of delivery); *Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.* (Mo.), 9 R. R. R. 299, 32 Am. & Eng. R. Cas., N. S., 299 (conversion where delivery to consignee without presentation of bill of lading or payment of draft); *Collins v. Illinois Cent. R. Co.* (Mo.), 3 R. R. R. 37, 26 Am. & Eng. R. Cas., N. S., 37 (sufficiency of evidence of); *Gulf, C. & S. F. Ry. Co. v. Darby* (Tex.), 3 R. R. R. 1, 26 Am. & Eng. R. Cas., N. S., 1 (conversion of wheat recovered and retained by carrier, during delay in carriage and delivery); note, 10 R. R. R. 481, 33 Am. & Eng. R. Cas., N. S., 481; *Baker v. Chicago, etc., Ry. Co.* (Iowa), 6 Am. & Eng. R. Cas., N. S., 772; *Downing v. Outerbridge* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 861; *Gulf, C. & S. R. Co. v. Fowler* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 424.

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liability that it was entitled to retain the hogs until the freight was paid.

Same—Misdelivery—Claim—Notice.—A provision in a contract of affreightment that it should be a condition precedent to the right of the shipper to recover damage for loss or injury to the live stock that he give notice in writing of his claim to the agent of the carrier actually delivering the stock to him, whether at destination or at any intermediate point where the same may be actually delivered, before the stock is removed from the place of destination and before the stock is intermingled with other stock, has no application to a claim for damages for misdelivery.

Same—Damages.†—Where defendant railroad company misdelivered certain hogs to a stockyards company, instead of the consignee, plaintiff was entitled to recover a sum which he was required to pay the stockyards company for feeding the hogs before he could regain possession thereof.

Same.—Plaintiff was not entitled to recover expense incurred by him on a trip to the place of destination of the hogs in order to recover them; such expense not being the proximate or natural consequence of the carrier's breach of contract.

Same.—A provision in a contract for shipment of hogs that, should damage occur for which the carrier might be liable, the value at the place and date of shipment should govern the settlement, in which the amount claimed should not exceed \$5 for each hog, had no application to a claim for damages for misdelivery, and did not prevent plaintiff from recovering damages, consisting of a fall in the market price at the place of destination.

Appeal from Circuit Court, Jackson County; J. A. Bilbro, Judge.

Action by L. T. Webb against the Southern Railway Company for breach of a contract for the transportation of hogs. From a judgment in favor of plaintiff for less than the relief demanded, both parties appeal. Reversed.

The complaint contained two counts. The first count was in the Code form against a common carrier upon a bill of lading. The second count sought to recover damages for special breaches of the contract of affreightment by reason of the defendant failing to deliver the car load of hogs shipped to the consignees. The damages claimed are sufficiently shown in the opinion. The defendant pleaded the general issue and several special pleas. The second special plea was in words and figures as follows: "It did not contract with plaintiff in the manner and form as alleged." The third, fourth, and fifth special pleas set up the fact that the plaintiffs did not keep and perform the stipulation of said contract mentioned in count 2, in that he failed to unload said hogs and failed to ride on the same freight train, and that he did not give notice in writing of his claim as required by said contract. The sixth special plea set up that on the day of the shipment plaintiff's agent, one Robinson, modified the contract of affreightment by directing that said hogs should be shipped to

†For the authorities in this series on the question as to what damages are recoverable for loss of, or injury to, or delay in delivering freight, see foot-note appended to *Lewark v. Norfolk & S. R. Co.* (N. Car.), 14 R. R. R. 420, 37 Am. & Eng. R. Cas., N. S., 420.

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Askew & Mixon, care of Union Stockyards, and that there was endorsed on the waybill by defendant's agent the fact that they were so shipped.

The contract of affreightment, which was introduced in evidence, contained the following stipulations: "And it is further agreed that the owner and shipper, or his agent or agents in charge of stock, shall ride upon the freight train on which the stock is transported, and that he does assume and release said railroad companies from all risk of personal injury while upon or about the train of the companies. And it is further agreed that, should damages occur for which the companies may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, * * * for hogs, \$5.00 each. And it is further agreed that, as a condition precedent to the right of the owner and shipper to recover any damage for any loss or injury to said live stock, he will give notice in writing of his claim therefor to the agent of the railroad company actually delivering said stock to him, whether at the point of destination or at any intermediate point where the same may be actually delivered, before said stock is removed from the place of destination above mentioned, and before said stock is intermingled with the other stock." Against the objection and exception of the defendant the plaintiff introduced evidence tending to show that, before he could obtain possession of the car load of hogs, which had been delivered to the Brady Union Stockyards, he was required to pay to said stockyards the sum of \$73.62, which was the feed bill charged by said stockyards for feeding the hogs after their delivery; that it was necessary for him to make a special trip to Atlanta, the expenses of which were shown; and that there was considerable loss in the weight of the hogs during their detention. The other facts in the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Among other charges requested by the defendant, to the court's refusal to give each of which the defendant separately excepted, was the general affirmative charge in favor of the defendant. The court, in its oral charge to the jury, instructed them in effect that the plaintiff was entitled to recover the amount paid to the Brady Union Stockyards and the expenses of his trip to Atlanta, and the amount or value of the loss in weight of the hogs between the time they should have been delivered to Askew & Mixon and the time they were received by the plaintiff, based on Paint Rock market. To this portion of the court's oral charge, the defendant separately excepted. The court in its oral charge also instructed the jury that plaintiff could not recover anything on account of the fall in price of hogs in Atlanta, and that under the contract the recovery must be based on the price of hogs at Paint Rock, Ala., and it appeared from the evidence that there had been no depreciation in the market value of hogs at Paint Rock. To this portion of the court's oral charge to the jury the plaintiff separately excepted.

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There were verdict and judgment in favor of the plaintiff, assessing his damages at \$120.26. The defendant made a motion for a new trial upon the grounds that the verdict of the jury was excessive and was contrary to the evidence. This motion was overruled, and the defendant duly excepted. The defendant appealed, and assigned as error the several rulings of the trial court to which it reserved exceptions. The plaintiff prosecuted a cross-appeal, and assigned as error the refusal of the court to admit the testimony as to the depreciation in market value of hogs at Atlanta between the time the said hogs were delivered to the Brady Union Stockyards and the time that they were received from the plaintiff, and that part of the court's oral charge which instructed the jury that the plaintiff was not entitled to recover the difference in the market value of the hogs between said times.

Humes, Sheffey & Speake, for Southern Ry. Co.
Virgil Bouldin, for Webb.

TYSON, J. This action is for the recovery of damages for the breach of contract of affreightment for a car of hogs received by defendant at Paint Rock, in this state, to be transported by it to Atlanta, Ga. and there delivered by it to Askew & Mixon, to whom it is alleged the hogs were consigned as plaintiff's agents. The special breach alleged in the second count of the complaint is that the defendant failed to deliver the hogs to the consignees, but delivered them to another and different person, to wit, Brady Union Stockyards. The damages sought to be recovered under this count were charges, amounting to \$73.62, exacted by the Brady Union Stockyards of plaintiff before he could regain possession of his hogs, the loss in the weight of the hogs, and the decline in their market price during their detention, expenses incurred by plaintiff in making a trip to Atlanta to regain their possession, and counsel fees for bringing this action. The trial court, it appears, allowed a recovery of all these damages, except for counsel fees and a decline in the market price of the hogs.

It is first insisted by the railway company that under the contract of affreightment, which is in writing, no recovery can or ought to be allowed, and therefore the affirmative charge requested by it should have been given. Preliminary to a discussion of this question, it may be well to say that the evidence tends to support each claim for damages which the plaintiff was permitted to recover, and, as we will show later on, a breach of the contract. The case of *N. C. & St. L. Ry. Co. v. Parker*, 123 Ala. 683, 27 South. 323, is relied upon as authority in support of the contention that no recovery can be had on the first count of the complaint, which is in Code form, because the evidence shows a special contract, whereas a common-law liability is counted on. This case was overruled on this point by *L. & N. R. R. Co. v. Landers*, 135 Ala. 504, 33 South. 482, where it was held that the Code form was broad enough to cover bills of lading con-

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taining special stipulations. It can scarcely be doubted that a recovery may be had on this count for at least nominal damages, if a breach of the contract was shown, and, indeed, there is no good reason why the damages resulting in the decreased weight of the hogs and their market value during their detention may not be recovered under it, unless by the terms of the contract their market price was to be determined at Paint Rock, instead of Atlanta, which will be discussed when we consider the plaintiff's assignment of error.

Was there a breach of the contract shown? The bill of lading designated Askew & Mixon as the consignees. The hogs were admittedly not delivered by defendant to them, but to the Brady Union Stockyards. The waybill showed them to be the consignees, and also showed the words "Union Stockyards" written in pencil below the names and address of the consignees, which appears to have been construed by the agents of defendant as directing their delivery of the hogs to the Union Stockyards for the consignees. After the contract of affreightment was executed, it appears that one Robinson, who signed it for plaintiff and to whom it was delivered for plaintiff, directed the words "Union Stockyards" to be written on the waybill. It is therefore insisted that, Robinson being the agent of the plaintiff to deliver the hogs for shipment, he was authorized to change the contract of affreightment and to direct their delivery to the "Union Stockyards." Robinson is shown affirmatively and without dispute not to have any such authority. Plaintiff had, in a letter to the agent, directed to whom they were to be consigned. The contract was written, signed, and delivered in accordance with his directions. Robinson was not his agent to make any contract for their shipment at all. His duties were simply to drive the hogs to Paint Rock and put them into the car, which he had previously ordered. It is true he signed the plaintiff's name to the contract, but this was without authority. But the plaintiff, having received the contract, must be held to have ratified his act in this respect, but not to have ratified its modification, which did not appear upon it, but only on the waybill, which the plaintiff never saw. Nor was it otherwise shown that plaintiff knew of the change of the contract when he received it from Robinson. At best, Robinson under the evidence was a special agent, and the defendant was bound at its peril to ascertain the extent of his authority. 3 Brick. Dig. p. 22, § 54.

Robinson being without authority to change the contract of affreightment as to the delivery of the hogs, a breach is shown; for undoubtedly the defendant was under as much obligation to deliver the hogs to the right person as it was to deliver them in a reasonable time and at the proper place, and the delivery by it of them to the wrong person was a conversion. The question is not one of due care; for the carrier, like any other bailee, acts at his peril in making the delivery. Angell on Carriers, § 324; Wood's Brown on Carriers, p. 319; 6 Cyc. p. 472. "No circumstances

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of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightly entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter for what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed on consignment." Hutchinson on Carriers, 344. In the case of North Penn. R. R. Co. v. Commercial Bank, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287, the court, speaking to the point here under consideration, said: "The duty of a common carrier is not merely to convey safely the goods intrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. There are no conditions which would release him from this duty, except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. A railroad company, it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injury to each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss; but, notwithstanding the difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them, if he presents himself or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or live stock, is more strictly enforced. * * * If the consignee is absent from the place of destination, or cannot after reasonable inquiries be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store with a responsible person, to be kept on account of and at the expense of the owner. He cannot release himself from responsibility by abandoning the goods or turning them over to one not entitled to receive them. * * * Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when the consignee is unknown or is absent, or cannot be found after diligent search. And if, after inquiry, the consignee * * * cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them

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prudently for and on account of their owner. He may thus relieve himself from the carrier's responsibility. He has no right under any circumstances to deliver to a stranger."

This quotation so satisfactorily announces the principle of law applicable to facts of the case, it would seem to be useless to pursue this phase of the inquiry further. But it is said that by the terms of the contract it was plaintiff's duty to accompany the hogs and unload them upon their arrival at Atlanta, and, had he complied with his duty in this respect, there would have been no misdelivery. This provision of the contract did not put upon plaintiff the obligation of seeing that the hogs were delivered to the consignee, and not to a stranger. The obligation of defendant to deliver to Askew & Mixon was absolute, and not conditioned upon plaintiff accompanying the car.

It is also urged that the defendant was entitled to retain the hogs until the freight was paid upon them. This is undoubtedly true, but it did not retain them, but converted them. A mere reading of the clause of the contract relating to the plaintiff giving notice of his claim before bringing suit will suffice to show that it was not intended to apply, and does not apply, to the claim for damages sought to be enforced here. The affirmative charge requested by defendant was properly refused.

The next contention is that the \$73.62, paid by plaintiff to Brady Union Stockyards, were not recoverable damages. There is no merit in this insistence. They are claimed in the complaint, and the evidence tends to show that plaintiff paid the sum, and that its payment was necessary to regain the possession of his property, which defendant had tortiously delivered to that concern. That they were proximate, and not remote, is practically admitted. *Renfro's Adm'r v. Hughes*, 69 Ala. 581.

We are of opinion, however, that the expenses incurred by plaintiff on his trip to Atlanta are not recoverable. They are not the proximate or natural consequence of the breach of the contract. *Jackson v. Smith*, 75 Ala. 97; *Foster v. Napier*, 74 Ala. 393. The allowance of a recovery of them by the court as damages is error, for which the judgment must be reversed.

The plaintiff also prosecuted an appeal from the judgment, and insists that error was committed in not permitting him to show that, during the period of detention of the hogs at the Brady Union Stockyards, their market price in Atlanta had declined from one-half to three-fourths of a cent per pound. This evidence shows that there had been no change in the market price of hogs at Paint Rock, the point of shipment, and that the hogs were shipped by plaintiff to his brokers, Askew & Mixon, for sale on the Atlanta market. The breach of the contract by defendant, as we have shown, occurred in Atlanta, and not in Paint Rock. The contract of affreightment contained this clause: "And it is further agreed that, should damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, * * * for hogs, \$5.00 each." Doubtless the

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ruling of the court was based upon this clause of the contract, which was construed by him to change the common-law rule fixing the measure of damages in this character of cases. Obligations of this kind are strictly construed against the carrier, and, unless the language employed is so definite and certain as to leave no room for the operation of the common-law rule, that construction will not be adopted. In other words, it must clearly appear that it was the intention of the parties that the rule of the common law was not to govern in ascertaining the damages suffered by plaintiff, but that the one fixed by the contract was to control. Whatever may be the field of operation of this clause of the contract, we are confident that it has no application to the facts of this case. It would seem that its purpose is merely to fix the maximum value of the live stock named in it, to be paid by the carrier in the event they are destroyed in transportation through its negligence.

The judgment must be reversed on both appeals. Reversed and remanded.

MCCLELLAN, C. J., and SIMPSON and ANDERSON, JJ, concur.

ALTON LIGHT & TRACTION CO. v. OLIVER.

(Supreme Court of Illinois, Oct. 24, 1905.)

[75 N. E. Rep. 419.]

Carriers—Street Railways—Speed of Car.*—Where the seats, aisles, and platform of a street car are crowded, the railway company should so regulate the speed as to use the highest degree of care for the safety of passengers consistent with the practical operation of the car.

Same—Contributory Negligence.†—Whether it was negligence to board a car in its crowded condition, when urged by the conductor to "Crowd on! This is the last car for the city"—is a question of fact for the jury.

Trial—Directing Verdict.—An instruction directing a verdict for defendant, if plaintiff had failed to prove certain allegations by a preponderance of the evidence, is properly refused, where a material allegation of negligence charged, and which the evidence tended to prove, has been omitted.

*For the authorities in this series on the question of the degree of care required of a carrier of passengers, see foot-notes appended to *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26; *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 15 R. R. R. 248, 38 Am. & Eng. R. Cas., N. S., 248.

For the authorities in this series on the question whether the speed of a car or train may be negligence with respect to passengers, see foot-notes appended to *Chicago & W. I. R. Co. v. Newell* (Ill.), 15 R. R. R. 706, 38 Am. & Eng. R. Cas., N. S., 706.

†For the authorities in this series on the question whether it is contributory negligence in a passenger to board a crowded car, see *Citizens' St. R. Co. v. Jolly* (Ind.), 8 R. R. R. 175, 31 Am. & Eng. R. Cas., N. S., 175 (not per se).

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Appeal from Appellate Court, Fourth District.

Action by Frank Oliver against the Alton Light & Traction Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Levi Davis, for appellant.

David E. Keefe, for appellee.

Boggs, J. The appellee, a boy of about the age of 16 years, was awarded judgment in the sum of \$6,500 against the appellant company for damages occasioned by personal injuries through the alleged negligence of the appellant company, and the judgment was affirmed by the Appellate Court for the Fourth District. This appeal seeks the reversal of the judgment of affirmance.

The declaration contained two counts, and we think the testimony so far tended to prove the allegations of each of them that the court did not err in refusing to grant the motion entered by the appellant company for a peremptory verdict in its favor.

The appellant company is a common carrier of passengers for hire, and on September 7, 1903, was operating cars on its line for the transportation of passengers from Rock Springs Park to the city of Alton. It was Labor Day, and the labor organizations had a picnic at the park. The appellee was in attendance, and about 9:30 o'clock p. m. became a passenger on one of appellant's cars to be transported to his home in the city of Alton. The evidence tended to show the following state of facts: The seats were all occupied when appellee entered the car. That the car was kept standing at the park entrance for some five minutes or more, and that the conductor kept calling out: "Crowd on! This is the last car for the city." That, when the car left the park, the seats were all occupied, and the aisles and platforms were crowded. That the appellee was crowded out onto the steps of the front platform. That two boys were seated on the step on which the appellee was also standing. That he paid his fare and was entitled to and asked for a transfer to another line. The evidence tended to show that while on the trip to the city, and while the car was going up a grade, the motoneer turned on all the electrical power that the motor would permit, and that, while the car was in rapid motion, the conductor crowded out onto the front platform and cried out, "Transfers!" That appellee, who had been holding onto the handle of the car, released one hand to take a transfer ticket from the conductor. That at this moment the car gave a lurch and threw other passengers, who also stood on the platform, against the appellee (as charged in the first count) and knocked him from the car, or the lurching and rapid motion of the car threw him therefrom (as charged in the second count), and that he fell with his left foot under the car, across the rail, and the wheel of the car passed over his left foot, rendering amputation necessary, and his left leg was amputated a few inches below the knee.

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The servants of the appellant company invited passengers to occupy the car beyond its capacity, and knowingly permitted, if they did not induce, passengers to stand on the platforms and steps of the car. In such case the carrier assumes the duty of exercising, for the protection and safety of the passengers, that degree of care that is demanded by the circumstances. *North Chicago Street Railroad Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793. The obligation of a common carrier, which rested on the appellant company, was to do all that human care, vigilance, and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road, to convey appellee and the other passengers in safety to his and their destination. Slight care and foresight only was necessary to arouse apprehension that the passengers on the platform and steps of the car would be endangered by any excessive speed, and that speed even more moderate than the usual rate of speed was the more prudent and safe course for the safety of such passengers. It was the duty of the appellant company to regulate the speed of its car in view of the fact that it had encouraged its patrons to overcrowd the aisles, platforms, and steps. The high degree of care which the law enjoined upon it for the safety of its passengers should have been the paramount consideration. The practical operation of the car did not require that a rapid rate of speed should be employed. Whether it was negligence on the part of the appellee, as a passenger, to stand on the steps or platform of the car, was a question of fact for the decision of the jury (*North Chicago Street Railroad Co. v. Polkey, supra*), and not of law to be inferred by the court. The cause was properly submitted to the jury.

It is complained that the court gave instructions Nos. 3a and 4. These instructions are as follows: "(3a) The court instructs the jury that the acts of negligence charged against the defendant in plaintiff's declaration are negligence in permitting its cars, on which the plaintiff rode, to be overcrowded, and negligence in running its car, on which the plaintiff rode, at an excessive rate of speed. (4) The court instructs the jury that if you believe, from the preponderance of the evidence in this case, that the plaintiff, Frank Oliver, on the 7th day of September, 1903, became a passenger on one of defendant's cars, and that, while he was a passenger of such car, he, while exercising due care for his own safety, was injured by the negligence of the defendant, as charged in plaintiff's declaration, or some count thereof, then in law the defendant is liable for such injury, and the jury should so find by their verdict." Counsel says that No. 4, standing by itself, was not objectionable, but that, considered in connection with No. 3a, it was seriously hurtful to the appellant company. Counsel insists that instruction 3a applies to both counts of the declaration, and does not state fully the essential elements of the negligence charged in either count; that the jury were likely to understand from instruction 4, considered in connection with instruction 3a, that proof that the car was overcrowded merely

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would sustain the issue made under the first count. Both counts of the declaration charged that the company was guilty of negligence in causing and permitting the car to be overcrowded. The first count charged that the motion of the car forced the other passengers against the appellee, and thus pushed him from the car. The second count charged like negligence in overcrowding the car, and that the motion of the car, the speed being rapid and dangerous, threw the appellee from the car. The overcrowding of the car and the motion or movement of the car were elements of negligence in both counts, and the manner in which the motion operated to throw the appellee from his place on the steps was stated differently in the two counts. The first count was based upon the theory that the appellant company induced and permitted the car, the platforms, and the steps thereof to be so crowded with passengers that the movement or motion of the car at an ordinary rate of speed was dangerous to passengers, and that therefore the appellant company failed in its duty towards its passengers by attempting to run the car, so overcrowded, in the same manner and with the same speed and motion as would have been employed had it contained no more passengers than it was intended to accommodate and convey in safety. The second count charged the same negligence as to the overcrowding of the car, and alleged in addition that the company negligently propelled its car at even a greater than the ordinary rate of speed. Instruction No. 3a, therefore, though not carefully drawn, did not misdirect the jury as to the issues.

Instruction No. 8, asked by the appellant company and refused, would have advised the jury that, if they believed from the evidence that it was not proved that a crowd of persons on a car pushed and forced the appellee from the car, they should return a verdict of not guilty. This instruction, if given, would have ignored and denied recovery if the appellee was thrown from the steps of the car by the rapid and excessive rate of speed thereof, as charged in the second count of the declaration. There was, as we have seen, evidence tending to support the negligence charged in the second count, and instruction No. 8 was therefore properly refused. Other instructions given for the appellant advised the jury that they should not return a verdict for the appellee unless he had proved his case by a preponderance of the evidence.

The eleventh instruction asked by the appellant company and refused sought to have the court direct the jury that, if the car was crowded at the time the appellee entered the same to become a passenger, then the appellee could not recover. It may be doubted whether there was proof on which to base this instruction; but, aside from that, in view of the fact that the conductor invited persons to become passengers after the car had become crowded, the court could not say as a matter of law, as the instruction asked him to do, that there could be no recovery. It was a question of fact whether appellee would under such circumstances have been guilty of negligence in going upon the car.

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The judgment should not be reversed because the court refused to give instruction No. 14 asked by the appellant company. Instructions Nos. 5 and 6, which were given in the same behalf, correctly advised the jury as to the matters properly intended to be given by instruction No. 14. In addition to that, instruction No. 14, if given, would have advised the jury (to quote therefrom) "that the mere fact that the car was overcrowded, if proven, is not proof of negligence on the part of the defendant," and it was so framed as to authorize a verdict for the appellant company without consideration of the allegation of negligence in moving the car at a rapid and dangerous rate of speed, and the proof in support of that charge of negligence.

The record is free from error reversible in character, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

ELGIN, A. & S. TRACTION CO. v. WILSON.

(Supreme Court of Illinois, Oct. 24, 1905.)

[75 N. E. Rep. 436.]

Carriers—Collision—Injury to Passenger.*—In an action against a carrier for injuries to a passenger, evidence of collision between trains, without any contributory negligence on the part of the passenger, authorizes recovery.

Same—Negligence.—Where the evidence showed that a passenger was injured by the failure of a railroad company to keep a main-track switch locked or guarded, so as to prevent it from being improperly thrown, whether this was actionable negligence is a question for the jury.

Same—Tort of Third Person.—That a passenger was injured by the tort of a third person does not relieve the carrier from liability for its failure to use due care which gave an opportunity to such person to commit the act.

Same—Evidence.—In an action for injuries to a passenger, where it is alleged that the train was running at a dangerous speed, the condition of the cars after the collision may be shown.

Damages—Pleading—Variance.—Proof that one of plaintiff's legs was broken and an elbow injured is no variance from an allegation that divers bones of her body were broken.

Evidence—Opinion of Expert.†—It is not proper to permit a medi-

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see foot-notes appended to *Fagan v. Rhode Island Co.* (R. I.), 16 R. R. R. 22, 39 Am. & Eng. R. Cas., N. S., 22; foot-notes appended to *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 15 R. R. R. 248, 38 Am. & Eng. R. Cas., N. S., 248; foot-note appended to *Lincoln Traction Co. v. Heller* (Neb.), 14 R. R. R. 368, 37 Am. & Eng. R. Cas., N. S., 368; *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369.

†For the authorities in this series on the admissibility of expert and opinion evidence, see foot-note appended to *Schutz v. Union Ry. Co. of New York City* (N. J.), 15 R. R. R. 777, 38 Am. & Eng. R. Cas., N. S., 777.

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cal expert to give an opinion based on the testimony as he has construed it from having heard it.

Damages—Fright.—Where plaintiff claims that neurasthenia was brought about by injuries received in a collision, and defendant's witnesses testified that it might have been occasioned by other causes, plaintiff, on cross-examination, may show that it might have been caused by sudden fright and terror, where she was physically injured at the time of such fright.

Trial—Argument of Counsel.—Where, in an action for a collision caused by an unguarded switch, there was evidence that the switchman was watching a ball game, and the boy who threw the switch testified that it was not locked, an argument by plaintiff's counsel, based on the alleged negligence of the defendant, was proper.

Same—Taking Pleadings to Jury Room.—It is not reversible error to allow the jury to take the pleadings to the jury room.

Appeal—Estoppel to Allege Error.—Any error in allowing the jury to take the declaration, containing counts to which demurrers had been sustained, to the jury room, is not ground for reversal, where appellant's counsel declined appellee's offer to remove the objectionable count.

Appeal from Appellate Court, Second District.

Action by Natalie Wilson against the Elgin, Aurora & Southern Traction Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Hopkins & Scott and *John A. Russell*, for appellant.

Walter E. Healy and *Murphy & Alschuler*, for appellee.

Boggs, J. A judgment in the sum of \$3,000, entered in the circuit court of Kane county in favor of the appellee and against the appellant company for damages arising from a personal injury, was affirmed in the Appellate Court for the Second District. This is an appeal from the judgment of affirmance.

The trial court did not err in refusing to direct a peremptory verdict for the appellant company.

On August 2, 1902, a game of baseball was being played in the park along the line of the appellant company's railroad, about two and one-half miles from the city of Elgin, and about the same distance from the city of Dundee. The company maintained a switch at the park, and had transported a number of passengers from Elgin and Dundee to witness the game. The cars on which such passengers had been carried were run in upon the switch, there to remain until after the game, then to be used for the reception and return of the patrons of the game to their homes. The regular half-hourly service of other cars of the company was maintained along the main track to Carpentersville. One George L. March, an employee of the appellant company, was in charge of the switch on that day. After all of the cars that were used in conveying patrons of the ball game had arrived and had been placed on the switch, March closed the switch, leaving the main line open for the use of cars passing to and fro thereon. The switch was opened and closed by means of an iron arm or lever, and was moved by lifting up the lever from the ground and throwing it over in the opposite direction. The lever was

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not locked, but could be moved, and the switch opened, by any one. After throwing the lever so as to close the switch and leave the main track open for the passage of cars in the regular service of the company, the switch tender, March, left the switch and went into the park, where the game of ball was in progress. The park was inclosed with a tight plank fence about eight feet in height. A number of boys were playing near about the switch. One of them, Frank Lieb, about half an hour after March had left the switch, lifted up the arm or lever by which the switch was opened and closed, and threw it over, and this moved the rails of the switch track so that the switch, at its south end, connected with the track of the main line. A car which the appellant company was operating from Elgin to Carpentersville, and upon which appellee was riding as a passenger, which was moving at a high rate of speed on the main track, ran in upon the switch and collided with the empty cars standing thereon, and the appellee received the injuries for which she brought this action. The declaration contained six counts, and, among other allowed acts of negligence, relied upon the failure of the company to have the switch lever locked, and also a failure to have the same guarded, as grounds of actionable negligence. The testimony of the boy, Frank Lieb, showed that the appliance for moving the switch was not protected by a lock or otherwise, and could be moved by any one. Other testimony disclosed that the switch tender in charge of the switch had gone from his post into the park, where the game of ball was being played, and was there when the collision occurred.

Whether the failure to have the switch appliances provided with locks of some character, or, in the absence of such lock, to have a guard to watch and see that the switch was not improperly thrown or turned, constituted actionable negligence, was properly submitted by the court to the jury under instructions advising the jury that it was the duty of the appellant company, as the carrier of passengers, to do all that human care, vigilance, and foresight could reasonably do for the protection of its passengers that was consistent with the mode of conveyance it was engaged in providing and the practical operation of its road and of its business as a carrier of passengers. The appellant company is a common carrier of passengers for hire. The appellee became a passenger on one of its cars. The rule of liability is that applicable to the relation of carrier and passenger. Proof that the appellee was a passenger, that the car in which she was riding collided with another car, and that she was injured, no negligence appearing on her part, made a *prima facie* case of negligent failure on the part of the appellant to discharge the duty it owed to her, and entitled her to recover damages for the injuries sustained by her, unless the appellant company, by proof, should acquit itself of the presumption that the collision was in some way occasioned by its failure to discharge its duty as a public carrier to the appellee, as its passenger. *Galena & Chicago Union Railroad Co. v. Yarwood*, 15 Ill. 468; *Id.*, 17 Ill. 509, 65

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Am. Dec. 682; Pittsburgh, Cincinnati & St. Louis Railway Co. v. Thompson, 56 Ill. 138; Peoria, Pekin & Jacksonville Railroad Co. v. Reynolds, 88 Ill. 418; Eagle Packet Co. v. Defries, 94 Ill. 598, 34 Am. Rep. 245; North Chicago Street Railway Co. v. Cotton, 140 Ill. 486, 29 N. E. 899; New York, Chicago & St. Louis Railroad Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809. The same doctrine or rule is announced by Mr. Thompson in his work on Negligence. 3 Thompson on Negligence, 2758, 2761. The doctrine to be deduced from the above cases is that, when one becomes a passenger on a car of a common carrier to be transported from one station on its line to another, and has paid a consideration therefor, the contract on the part of the carrier is to provide safe and sound cars, track, and necessary appliances to carry the passenger to his or her destination without injury. Where such a passenger is injured by a collision, proof of the relation of passenger and carrier, of the collision and the injury, if no contributing negligence on the part of the passenger appears, makes a prima facie case for the resulting damages, and casts upon the common carrier the onus of proving that the injury resulted from inevitable accident or from some cause against which human prudence and foresight could not have provided. The mischievous act of the boy, Lieb, contributed to the injury in the case at bar. The failure of the company to provide some means for locking the switch arm or lever, or to have some one to prevent the disarrangement of an appliance so easily rendered dangerous to its passengers, was justly regarded by the court as a failure on its part to perform its obligation and duty to those who had entrusted themselves to its care as a public carrier. That a collision was caused by the tortious act of a stranger could have no effect to relieve the common carrier from responsibility to an injured passenger, if the failure of the carrier to do that which human foresight and forethought would have suggested presented the opportunity for the commission of the tortious act.

The court did not err in its rulings as to the admissibility of proof as to the condition of the car in which the appellee had been riding and of the car with which it collided after the accident. Whether the car upon which the appellee was riding as a passenger was moving at a very rapid, or at a moderate, rate of speed, was a contested question of fact. One charge of negligence in the declaration was that the car was being driven at a dangerous rate of speed and that the collision was the result thereof. The manner in which these cars were driven together and broken and damaged, as shown by the proof, tended to support the view of the appellee that the car in which she was riding was moving at a very great rate of speed.

Witnesses for the appellee were permitted, over the objection of the appellant company, to state that the switch in question could be seen from the front platform of a car approaching from the south a distance of 300 feet. It is urged that there was no attempt to show that the size and speed of the car from which the witnesses made their observations, the physical conditions of

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the track, and the surroundings of the right of way, were the same as at the time of the accident, and that for such reason it was error to admit the proof complained of. We have examined the record, and think it was shown that the essential conditions were the same when the experiments were made and when the accident occurred.

But, aside from that, if error in this respect occurred it would not justify a reversal of the judgment. The appellee, in part, relied on the charge that the displacement of the switch was visible to the motoneer at such a distance therefrom that, had he been watching the track, at it was his duty to do, instead of trying to see the ball game, as she insisted the proof showed he was doing, he would have discovered that the switch had been turned in time to have stopped the car and averted the accident. The evidence under consideration was directed to this issue, and this only. As we have seen, the appellee was entitled to recover unless the appellant company should, by proof, overcome the presumption which arose against it. This it ineffectually attempted to do by showing that the switch was turned by the boy, Lieb; for the proof introduced on its part for this purpose indisputably established that the real cause of the injury was the failure of the employee, which the company had placed there in charge of the switch, to remain at his post and see that the switch was not tampered with, or the failure of the appellant company to provide a lock for the switch arm or lever, in consequence whereof a dangerous appliance of the company's road was left unprotected against the pranks of mischievous boys. This state of case, aside from the alleged negligent failure of the motoneer to observe the displacement of the switch, demanded a verdict and judgment for the appellee.

The declaration alleged that the appellee "was greatly bruised, hurt, and wounded, and divers bones of her body were there and then broken, and she became sick," etc. The proof showed a fracture of the tibia of the left leg and an injury to the right elbow, and we are urged to reverse the judgment on the ground that there is a clear distinction between the body and the limbs of the body, and consequently there is a variance between the allegations of the pleading and the proof. One definition given by Mr. Webster of the word "body" is "the entire physical part of a man." This meaning is properly to be given the word as employed in the declaration, and it was not essential there should be greater particularization as to the bones that were broken.

It is complained that Dr. Strum, a witness for the appellee, was allowed to state his opinion as a medical expert, not based on a hypothetical state of facts, but, in part, upon the testimony of the appellee as a witness, as the doctor heard and construed her testimony. A physician or a surgeon who has treated a patient may express an opinion as to the physical condition of such patient, based on information gained while so administering professionally for the affliction, or a physician may testify as an expert from information obtained from a physical examination

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of the person who is the subject of the inquiry. If the opinion of a physician is desired on the case made or claimed to be made by the testimony produced on the hearing, he should not be permitted to state his opinion based on the conclusion arrived at by himself as to the case made by the evidence as he heard it and gave it weight. The proper course is to state hypothetically the case which the party producing the witness thinks has been proved, and to ask an opinion based on such hypothetical case. The jury, who are the judges as to what has been proven, may then apply the opinion of the expert, if in their judgment the state of case on which it was based has been proven. To permit the expert to base an opinion on the testimony as he construes and has weighed it would be to permit him to exercise the functions of the jury, and, in a sense, decide the whole issues for them. *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

But the rule is that a court of review will not consider any other ground of objection than that urged in the court below. 3 Ency. of Pl. & Pr. 223. Dr. Strum testified that he had made two examinations of the person of the appellee, and that he was present and heard her testify as a witness. He was then asked the following question, to which objection was made, as shown below: "In view of that, and in view of the examination you have made, and also in view of the symptoms you have discovered by means of your examination, what relation, would you say, does her present condition bear to the injuries mentioned? (Objected to on the ground that the question is not predicated on the testimony in the case.)" The ground or grounds of this objection are not entirely clear. The ground intended to be advanced may have been that it was improper to base an opinion on anything save the testimony heard by the expert, and was improper because it asked for an opinion based also, in part, on the personal examination of the appellee. It may have been on the ground that it was improper because it was not predicated on all of the testimony in the case relative to the physical condition of the appellee. Giving to the objection either of these meanings, if either ground of objection had been sustained, the correct rule would not have been applied.

The testimony in behalf of the appellee tended to show she suffered from neurasthenia as a result of the collision. Physicians introduced by the appellant company gave testimony tending to show that neurasthenia with which the appellee suffered might have been occasioned by various specified causes other than the physical injuries suffered by the appellee. On cross-examination the counsel for appellee were permitted to ask if neurasthenia could not be produced by great and sudden fright, and the witnesses answered that it could be so produced. It is urged that fright alone cannot sustain a recovery of damages. The doctrine seems to be that liability cannot exist if predicated on fright or terror, unaccompanied by contemporaneous physical injury. *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A.

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199; 8 Am. & Eng. Ency. of Law (2d Ed.) 665; 13 Cyc. 42, 43. Here the appellee received physical injuries contemporaneous with the alleged fright or terror.

The contention that counsel for the appellee were permitted to indulge in improper argument is without merit. The specific ground of this complaint is that counsel insisted, in argument to the jury, on recovery on the ground the appellant company had negligently failed to lock the switch or negligently failed to watch and guard the switch. This argument is denounced as improper, on the assertion there was no proof to sustain either of the alleged delinquencies. It appeared from the testimony of the boy, Lieb, that the switch arm or lever was not locked, and from other testimony in the case that the employee of the company in charge of the switch was within the inclosure of the park when the boy turned the switch.

Demurrer was sustained to the third and fourth counts of the declaration, and it is complained that the court permitted the entire declaration containing said third and fourth counts to be taken by the jury when they retired to consider of their verdict. The practice of permitting the pleadings in civil actions to be taken by the jury in their retirement is not to be commended. Counsel may procure the court, in the instructions, to state the issues to the jury, and that course should be resorted to. It is not, however, error of reversible character to send the pleadings to the jury; but counts in the declaration to which demurrers have been sustained should not accompany the other pleadings. When the appellant company's counsel objected to the declaration going to the jury, counsel for the appellee stated to the court and to counsel for the appellant that, if counsel for the appellant would state that they desired the counts to which demurrers had been sustained to be removed from the declaration, it would be done. Counsel for the appellant replied that they simply wanted the record to show they had objected, and that the objection had been overruled, and that they had excepted. It is manifest counsel for the appellant were not endeavoring to prevent erroneous action that would prejudice the cause of their client, but were only seeking to inject error into the record. They could have voluntarily avoided the error, but declined, in order that, in the event of an unfavorable verdict, they might obtain a reversal upon merely technical grounds. We will not entertain the objection.

We do not think that instructions Nos. 1 and 2 authorized the jury to return a verdict for the appellee on ground of recovery not charged in the declaration, as counsel for the appellant urge. These instructions advised the jury as to the degree of care required of the appellant as a public carrier, and directed them, in instruction No. 1, that "if, from the evidence, the jury believe that the company failed to exercise toward the said plaintiff, at the time in question," such degree of care, and that she was injured thereby, she could recover, and, by the second instruction, that she could recover if the jury "found, from the evidence,

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the defendant did not exercise" the specified degree of care. The jury were restricted to grounds of discovery disclosed by the evidence. It is not contended that the court permitted evidence to be produced that was not applicable to the issues made by the pleadings; hence the instructions did not authorize a verdict for appellee, except upon the issues under the pleadings.

Instructions Nos. 17, 18, and 19, asked by the appellant, were properly refused. Nos. 17 and 18 declared there could be no recovery if the accident and injury could not have occurred if the switch had not been turned or misplaced by the boy, Lieb. If, as we have seen, the appellant company owed it to the appellee as a legal duty, as a public carrier, to lock or guard the switch, and failed to discharge that duty, the right of recovery existed, notwithstanding the tortious act of Lieb intervened to occasion the collision. No. 19 was properly refused, for the reason it required only the exercise of reasonable care on the part of the appellant company in the management of the road and the management of the car in the transfer of the appellee to her destination.

The judgment must be, and is, affirmed.

Judgment affirmed.

LOUISVILLE RY. CO. *et al.* v. BLUM. SAME v. GOODMAN.

(Court of Appeals of Kentucky, Oct. 20, 1905.)

[89 S. W. Rep. 186.]

Carriers—Collision—Injury to Passenger—Joint Liability.*—Where a collision occurs between the carriage of one common carrier and the car of another, both being negligent, injuring the passenger of one, both are liable; the negligence of one not excusing the other.

Damages—Personal Injuries—Instructions.—An instruction in a personal injury case that, if the jury find for plaintiff, they will fix his general damages at such sum as will reasonably and fairly compensate him for his bodily injuries, if any, not exceeding the sum claimed in the petition, and will also find special damages in such sum as will reasonably and fairly compensate him for his expense in getting cured, for his loss of time, and for injury to his clothes, if any, not exceeding the amount claimed, is substantially correct.

Appeal—Instructions—Failure to Request.—Where formal objection was made to all instructions given, and several instructions were offered as to certain matters, but none were offered or asked on the measure of damages, a party may not complain that such an instruction as he claims should have been given on that subject was not given.

*See note appended to *West Chicago St. R. Co. v. Piper* (Ill.), 9 Am. & Eng. R. Cas., N. S., 147; *Atlantic & P. Ry. Co. v. Laird* (U. S.), 8 Am. & Eng. R. Cas., N. S., 365; *St. Louis, etc., Ry. Co. v. Battle* (Ark.), 22 Am. & Eng. R. Cas., N. S., 700 (liability of intersecting railroad as joint tortfeasor because of proximity of defective platform of other company, used by its own passengers); *Pennsylvania R. Co. v. Jones* (U. S.), 2 Am. & Eng. R. Cas., N. S., 389 (joint liability of companies using track and operating trains in common for injuries to passengers of one of them caused by collision).

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Appeals from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

“Not to be officially reported.”

Two actions, one by J. J. Blum and the other by Clara Goodman, against the Louisville Railway Company and another. From judgments for plaintiffs, defendants appeal. Affirmed.

Fairleigh, Straus & Fairleigh and *Greene & Van Winkle*, for appellants.

M. A., D. A. & J. G. Sachs and *Barker & Woods*, for appellees.

SETTLE, J. These two actions, one brought by appellee J. J. Blum against appellants and the other by appellee Clara Goodman against the same parties, were tried together in the lower court. Appellees, J. J. Blum and Clara Goodman, are brother and sister. Both were injured near their residence in the city of Louisville, on the evening of November 25, 1902, by a collision between a carriage, the property of appellant Louisville Carriage Company, in which they were riding, and one of appellant Louisville Railway Company's electric street cars. At the time of the collision appellees were being driven by an employee of appellant carriage company from their residence to a Thanksgiving entertainment in a distant part of the city; the vehicle, horse, and driver having been hired by them for that purpose. It is in substance averred in the petitions that the carriage in which appellees were riding was in charge of appellant carriage company, acting by and through its driver, and at the same time and place appellant railway company was operating on the same street an electric street car in charge of its motorman, and that the driver in charge of the carriage and motorman in charge of the street car conducted themselves in such an unskillful and negligent manner as to cause a collision between the carriage and street car, whereby the carriage was violently upset, dragged along the street, and crushed, and the appellees seriously cut, bruised, and otherwise wounded upon their faces, heads, and other parts of their bodies, thereby causing them great physical and mental pain and suffering. The answers of the appellant railway company deny that there was any negligence on the part of the motorman in charge of the car and aver contributory negligence on the part of appellees and that their injuries were caused by the negligence of the carriage driver. The answers of appellant carriage company deny that its carriage driver was negligent, or that the injuries of appellees were caused by his negligence, and aver that their injuries were caused by the negligence of appellant railway company's motorman alone. The affirmative matter of the several answers was denied by a reply to each. The trial resulted in a verdict for each of the appellees against both appellants. The verdicts returned by the jury read as follows: “We of the jury find both of the defendants equally guilty, and fix damages as follows: To Mr. Jacob J. Blum: For general

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damages, \$500.00; for special damages, \$224.50. Total, \$724.50. Also for Clara Goodman: For general damages, \$250.00; for special damages, \$76.00. Total, \$326.00." Judgments were duly entered in accordance with the verdicts, and of those judgments and the refusal of the lower court to grant them a new trial appellants complain.

We gather from the evidence the following undisputed facts: That the residence of appellees, numbered 1608, is situated on the west side of Second street, between Hill street on the south and Burnett avenue on the north. Second street runs north and south; Hill and Burnett streets, east and west. The lot of appellees is twice as far from Hill street as it is from Burnett avenue. Second street is 60 feet wide, and contains a double line of street railway tracks. The cars going south use the western track, and those north the eastern track. In going to appellee's residence with the carriage, the driver traveled the west side of the street, and upon arriving at the house stopped in front thereof with the horse's head toward Hill street; but, when appellee's entered the carriage and directed the driver to take them to the Standard Club, the place of the entertainment, which is in the northern end of the city, it became necessary for him to take the other, or east, side of Second street, which is used by vehicles going north. In reaching the east side of Second street from appellees' residence, the carriage had to cross both tracks of the appellant railway company, in attempting to do which it was struck by the north-bound street car. At the time of the collision the horse attached to the carriage had entirely crossed the eastern track, but the body of the carriage was on the track.

We have so far only referred to such of the facts as seem to be admitted by all the parties; but, in considering whether at the time the carriage left the house of appellees it was a negligent undertaking for the driver to attempt to cross the railway track in front of the approaching car, we reach a point in regard to which the evidence is very conflicting. The driver testified that about the time the carriage started across the street he saw the car leaving Hill street (i. e., entering Second street), which was about 282 feet from appellees' house, but that he thought he had time to cross the tracks before it would reach the point of crossing. Rommel, another driver of a similar vehicle, who was standing near by at the time, testified to the same effect, and also that the car increased its speed as it approached, and gave no signal with its gong to warn persons in front of its coming. Other witnesses testified that the car was running at an unusual rate of speed without sounding the gong, and two of them that as the car approached the carriage, and about the time of its striking it, the motorman in charge was looking back in the car, instead of looking out ahead of it. In brief, appellees' evidence, and that introduced by the appellant carriage company, strongly conduced to show that the motorman in charge of the car was guilty of negligence at the time of the accident, but for which it would not have occurred. Upon the other hand, there were

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witnesses for the railway company who testified that the motorman was looking ahead of the car, that it was running at a moderate and the usual rate of speed, and that the gong was sounded as it approached the carriage. The testimony of some of these witnesses conduced to prove that the driver of the carriage was guilty of negligence, in that he attempted to cross the track in front of the car when it was so close that one of ordinary prudence must have known that a collision was inevitable. We think the weight of the evidence supports the view that the driver and motorman were both guilty of negligence, and that their joint and concurring negligence caused the collision resulting in appellees' injuries. In other words, the driver of the carriage was guilty of negligence with respect to appellees in attempting to cross the railway track in front of the approaching car, which was less than 100 yards away when he left appellees' residence, and, of course, considerably nearer at the time he reached the point of crossing the railway track. Under such circumstances he should, upon or before reaching the track, have waited for the car to pass before driving upon it. Upon the other hand, we think it equally clear that if the motorman had been looking ahead of the car, and had not unduly increased its speed after entering Second from Hill street, he would have discovered the presence of the carriage on the track in time to have stopped the car before striking it, or so reduced its speed as to have prevented injury to appellees.

It is unnecessary to discriminate between the appellants as to the degree of care required of them in avoiding a collision. Both were common carriers, with equal right to the use of the street. Each carried in its vehicle passengers, to whom it owed the highest degree of care, and in using the street ordinary care should have been exercised by the servant of each of them in avoiding a collision. According to the evidence, neither carrier used ordinary care to avoid the collision. Consequently both were liable to appellees for the injuries sustained by the collision, and neither can plead or rely upon the negligence of the other as a defense. *L. & C. R. R. Co. v. Case's Adm'r*, 9 Bush. 735; *Lou. Packet Co. v. Mulligan*, 77 S. W. 704, 25 Ky. Law Rep. 1287; *Pugh v. C. & O. Ry. Co.*, 101 Ky. 77, 39 S. W. 695, 72 Am. St. Rep. 392; *Lou, etc., Mail Co. v. Barnes' Adm'r*, 79 S. W. 261, 25 Ky. Law Rep. 2036; *Central Passenger Ry. Co. v. Kuhn*, 86 Ky. 593, 6 S. W. 441, 9 Am. St. Rep. 309. As the instructions given by the trial court on this point conform to the view of the law herein expressed, we are unable to discover any grounds for sustaining the objections made to them by counsel for appellants.

It is, however, insisted that the court erred in instructions as to the measure of damages. The two instructions as to the measure of damages were as follows: "(3) If the jury find for the plaintiff Jacob J. Blum, they will fix his general damages at such sum as will reasonably and fairly compensate him for his bodily injuries, if any, and for his suffering, physical and mental, not to

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exceed the sum of \$2,500, the amount claimed in his petition, and they will also find for him special damages in such sum as will reasonably and fairly compensate him for his expense in getting cured, for his loss of time, and for injury to his clothes, if any such expense, injury, or loss there was, not to exceed the sum of \$513.50, the amount claimed in his petition. (4) If the jury find for the plaintiff Clara Goodman, they will fix her general damages in such sum as will reasonably and fairly compensate her for her bodily injuries, if any, and for her suffering, physical and mental, not to exceed the sum of \$2,500, the amount claimed in her petition, and will also find for her in such sum in special damages as will reasonably and fairly compensate her for her expense in getting cured and for injury to her clothes, if any such injury or expense there was, not to exceed the sum of \$110, the amount claimed in her petition." While in some sort differing in form from the instructions usually given in such cases, we think these instructions substantially correct. They confine the recovery to compensatory damages. The appellee Blum, in addition to the general damages asked, alleged and proved special damages, made up of injury to his clothes, physician's bill, cost of medicine, and loss of time. The verdict allowed him \$500 general damages, which is not excessive, considering the character of his wounds and his mental and physical sufferings, and \$224.50 as special damages, which sum is apparently reasonable and only made him whole on the items of special damages. As the injuries of appellee Goodman were much less serious than those of her brother, the sum awarded her was correspondingly less in amount; but it cannot fairly be claimed that either the general or special damages allowed her were more than compensatory, or that they were not authorized by the evidence.

While formal objection was made by appellants to all the instructions given by the court, and several instructions were offered by them on other features of the cases, they did not ask or offer an instruction on the measure of damages, in consequence of which, and according to the repeated ruling of this court, they are now estopped to complain that the trial court did not give such an instruction on that point as they now insist should have been given.

Our examination of the record convinces us that no prejudicial error was committed by the lower court in any of its rulings, or in the matter of giving or refusing instructions. Wherefore the judgment is affirmed.

ILLINOIS CENT. R. CO. *v.* ALLEN.

(Court of Appeals of Kentucky, Oct. 5, 1905.)

[89 S. W. Rep. 150.]

Carriers—Duty to Passenger—Performance of Contract of Carriage.*—The duty of a carrier of passengers is to attend to the comfort and safety of all its passengers alike, but not to furnish especial attention to any one in particular, unless under exceptional circumstances, such as sickness en route; but, if a carrier voluntarily accepts a helpless passenger without an attendant, it will assume the additional care commensurate with his needs.

Same—Duty to Receive Passengers—Infirm Persons.*—A blind man, 77 years of age, applied to a railway agent for a ticket for a journey necessitating the changing of cars two or three times. When he applied for the ticket, he was accompanied by an attendant. He frequently took short trips involving no change of cars, and on these trips some one would assist him getting on and off the train. On taking a trip involving a change of cars, he depended on the assistance of chance acquaintances, or the employees in charge of the train. Held, that the carrier was justified in refusing to sell him a ticket unless he secured an attendant.

Same—Rules of Carrier—Validity.†—A rule of a railway company

*As to whether a railroad company is required to accept as passengers persons unable to care for themselves, see foot-notes appended to *Tuttle v. Cincinnati, etc., Ry. Co. (Ky.)*, 13 R. R. R. 333, 36 Am. & Eng. R. Cas., N. S., 333 (intoxicated persons); foot-note appended to *Illinois Cent. R. Co. v. Smith (Miss.)*, 15 R. R. R. 293, 38 Am. & Eng. R. Cas., N. S., 293; note, 6 Am. & Eng. R. Cas., N. S., 270 (disabled persons without attendant); note, 11 Am. & Eng. R. Cas., N. S., 835 (insane persons); note, 6 Am. & Eng. R. Cas., N. S., 270 (persons who may be excluded); note, 11 Am. & Eng. R. Cas., N. S., 833 (sick persons).

As to the duties and liabilities of the carrier as affected by the infirmity or helpless condition of a passenger, see foot-notes appended to *Tuttle v. Cincinnati, etc., Ry. Co. (Ky.)*, 13 R. R. R. 333, 36 Am. & Eng. R. Cas., N. S., 333 (intoxicated passengers); *Atchison, etc., Ry. Co. v. Parry (Kan.)*, 8 R. R. R. 215, 31 Am. & Eng. R. Cas., N. S., 215 (duties to sick passengers); *Memphis St. Ry. Co. v. Shaw (Tenn.)*, 8 R. R. R. 255, 31 Am. & Eng. R. Cas., N. S., 255 (duty to assist aged passenger to alight); note, 9 Am. & Eng. R. Cas., N. S., 658 (age, sex, and condition of passenger as affecting degree of care required of carrier); note, 9 Am. & Eng. R. Cas., N. S., 654 (duty to assist passenger to alight); note, 11 Am. & Eng. R. Cas., N. S., 836 (duties to sick passengers); note, 11 Am. & Eng. R. Cas., N. S., 836 (liability of carrier where passenger with apoplexy is thought to be intoxicated and taken from car); *Brady v. Old Colony R. Co. (Mass.)*, 2 Am. & Eng. R. Cas., N. S., 280; *Daniels v. Western & A. R. Co. (Ga.)*, 2 Am. & Eng. R. Cas., N. S., 280; *Madden v. Port Royal & W. C. R. Co. (S. Car.)*, 2 Am. & Eng. R. Cas., N. S., 384 (duty to assist infirm passengers to alight).

†For the authorities in this series on the question of the validity of a carrier of passengers' rules and regulations, see note, 2 Am. & Eng. R. Cas., N. S., 17 (rules with respect to carrying passengers on freight trains); note, 2 Am. & Eng. R. Cas., N. S., 23 (passengers bound by reasonable regulations); note, 2 Am. & Eng. R. Cas., N. S., 23 (right of carrier to make); notes, 17 Am. & Eng. R. Cas., N. S., 431, 20 Am. & Eng. R. Cas., N. S., 278; note, 2 Am. & Eng. R. Cas., N. S., 23 (what regulations are reasonable); *Illinois Cent. R. v. Harper (Miss.)*, 10 R. R. R. 612, 33 Am. & Eng. R. Cas., N. S., 612 (rule

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forbidding the sale of tickets to persons physically unable to take care of themselves, unless accompanied by an attendant, is only for the guidance of its servants, and cannot limit its responsibilities to the public, unless the rule can be justified by the principles governing the duties of carriers.

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

Action by E. E. Allen against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Trabue, Doolan & Cox, J. M. Dickinson, and Gordon, Gordon & Cox, for appellant.

Ruby Lafoon and Lee Gibson, for appellee.

BARKER, J. The appellee, E. E. Allen, was at the time this controversy arose 77 years old and totally blind. He resided near White Plains, Ky., and had a brother living in Ullen, Ill., who was in declining health. Having received a letter from his brother reciting the fact that the latter did not expect to live long, and requesting appellee to come to Ullen and see him before he died, the appellee applied to the ticket agent of appellant at White Plains for information concerning the railroad fare, and as to which of the two possible routes by way of its line was the best for him to travel. After receiving this information appellee applied to the agent on the 3d day of November, 1903, for a ticket to Ullen, tendering the proper amount of money to pay the fare.

of carrier as to route to be taken not binding on passenger without knowledge of rule); *Burns v. Boston El. Ry. Co.* (Mass.), 6 R. R. R. 918, 29 Am. & Eng. R. Cas., N. S., 918 (rule forbidding passengers to ride on platform not waived in plaintiff's favor by mere fact that he found other passengers riding on platform); *Greenfield v. Detroit & M. Ry. Co.* (Mich.), 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271 (waiver of rule requiring permit to ride on freight train implied from disregard); *Church v. Chicago, Milwaukee, etc., R. Co.* (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 1; *Decker v. Atchison, Topeka, etc., R. Co.* (Okla.), 2 Am. & Eng. R. Cas., N. S., 118; *Deery v. Camden & A. Ry. Co.* (Pa.), 2 Am. & Eng. R. Cas., N. S., 225; *Church v. Chicago, M., etc., R. Co.* (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 1 (failure of carrier to notify passenger of a regulation requiring passage upon most direct route); *Sheets v. Ohio River R. Co.* (W. Va.), 2 Am. & Eng. R. Cas., N. S., 129 (failure to inform conductor of change in rules); *Deery v. Camden & A. R. Co.* (Pa.), 2 Am. & Eng. R. Cas., N. S., 225 (implied consent of passenger to rule); *Graham v. McNeill* (Wash.), 12 Am. & Eng. R. Cas., N. S., 149 (notice against riding on platform waived by failure to provide sufficient seats); *Gregory v. Chicago, etc., Ry. Co.* (Iowa), 6 Am. & Eng. R. Cas., N. S., 775 (reasonableness of regulations); *Lake Shore & M. S. Ry. Co. v. Kelsey* (Ill.), 16 Am. & Eng. R. Cas., N. S., 82 (regulations binding on passenger having notice of them); *Jackson Elec. Ry. Light & Power Co. v. Lowry* (Miss.), 23 Am. & Eng. R. Cas., N. S., 103 (unreasonable rule against backing cars to receive passengers at crossing); *Deery v. Camden & A. R. Co.* (Pa.), 2 Am. & Eng. R. Cas., N. S., 225 (rule against passengers leaving car by baggage compartment); *Baltimore & O. R. Co. v. Meyers* (U. S.), 2 Am. & Eng. R. Cas., N. S., 225; *Omaha & R. V. R. Co. v. Chollette* (Neb.), 2

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The agent declined to sell him a ticket upon the ground that the company had a rule forbidding the sale of tickets to persons physically unable to take care of themselves, unless they were accompanied by an attendant. Being thus refused transportation, the appellee did not procure an attendant and go on his journey in obedience to the company's rule; but, finding that a neighbor, John Hanks, expected to make the journey about the coming Christmas, he waited and went with him on the 22d day of December, 1903, visited his brother, and then returned home. Conceiving that the action of the appellant's agent in refusing to sell him a ticket under the circumstances recited was unlawful and oppressive, appellee instituted this action to recover damages, alleging that he had suffered great mental anguish and sorrow, because he had been forced to wait 50 days before seeing his sick brother. The appellant, after its general demurrer to the petition had been overruled, filed an answer pleading its rule, and placing in issue all of the material allegations of the petition. A trial before a jury resulted in a verdict of \$300 in favor of the appellee, and from the judgment based on this verdict the railroad has appealed.

We will consider, first, the duty of common carriers of passengers in regard to persons applying for transportation who are, or appear to be, unable to care for themselves. May a lunatic have a ticket thrust into his hand, and be delivered to the employees of a railroad corporation to be transported to his destination, and cared for by them on the journey? May one known to be intoxicated be imposed upon the employees of a common

Am. & Eng. R. Cas., N. S., 225 (rule against passengers riding on platform); *Coffee v. Louisville & N. R. Co.* (Miss.), 14 Am. & Eng. R. Cas., N. S., 423 (reasonableness of rule as to checking baggage); *Weber Co. v. Chicago, etc., Ry. Co.* (Iowa), 20 Am. & Eng. R. Cas., N. S., 464 (waiver of rule prohibiting the receiving of merchandise as ordinary baggage); *Trimble v. New York Cent. & H. R. Co.* (N. Y.), 17 Am. & Eng. R. Cas., N. S., 176 (admissibility as evidence of rule requiring baggage master to exact release of liability from drummers as condition precedent to checking trunks); *Weber Co. v. Chicago, etc., Ry. Co.* (Iowa), 20 Am. & Eng. R. Cas., N. S., 464 (carrier not liable as warehouseman for sample cases knowingly shipped as baggage in violation of carrier's rules); *Southern Ry. Co. v. Watson* (Ga.), 18 Am. & Eng. R. Cas., N. S., 209 (regulation limiting life of ticket is reasonable where it provides for refunding price of ticket, or any unused part, if not used within limited period).

For the authorities in this series on the question of the validity of the rules and regulations of carriers of freight, see foot-note appended to *Robinson v. Baltimore & O. R. Co.* (C. C. A.), 12 R. R. R. 468, 35 Am. & Eng. R. Cas., N. S., 468 (rules and regulations with respect to receiving freight); *Chicago, R. I. & P. Ry. Co. v. Colby* (Neb.), 9 R. R. R. 283, 32 Am. & Eng. R. Cas., N. S., 283 (authority to make and reasonableness of); *New Orleans & N. E. R. Co. v. George* (Miss.), 9 R. R. R. 786, 32 Am. & Eng. R. Cas., N. S., 786 (rules imposing reasonable demurrage charges on consignee for delay in unloading cars are enforceable); *Coates v. Chicago, M. & St. P. R. Co.* (S. Dak.), 3 Am. & Eng. R. Cas., N. S., 426 (regulation that capacity of tank car shall be estimated at 40,000 pounds); *Kentucky Wagon Mfg. Co. v. Ohio & Miss. R. Co.* (Ky.), 2 Am. & Eng. R. Cas., N. S., 722 (rule fixing rate of demurrage).

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carrier without an attendant to care for him? Or may an old blind man demand that the corporation shall receive him as a passenger without an attendant, in order to make a long journey involving certainly two, and perhaps three, changes of cars? The answer to these questions is manifestly fraught with important consequences to carriers of passengers for hire. In the case of *L. & N. R. R. Co. v. Jordan*, 66 S. W. 27, 23 Ky. Law Rep. 1730, we said: "The law required of appellant that they should exercise the highest degree of care to safely transport appellee to her point of destination. But this duty did not require that appellant's conductor should act as special attendant to the plaintiff during the journey to see that she did not leave her seat. * * * His duty was to see after the comfort and safety of the passengers generally, and not one in particular." In *Illinois Central Railroad Company v. Smith*, 37 South. 643, the Supreme Court of Mississippi say: "Primarily the affliction of blindness unfits every person for safe traveling by railway, if unaccompanied. No blind person without previous experience could possibly accommodate himself to the many exigencies incident to traveling by railroad, or guard himself against peril in boarding and alighting from trains, changing from one train to another, or threading his way in safety across the railroad tracks at crowded stations. Hence the rule which provides that every blind person is presumed to be, in the absence of proof of experience, unfit to travel alone, is not unreasonable; nor do we consider such a regulation a hardship upon persons afflicted with blindness or other disabling physical infirmity. It is rather a safeguard thrown around them for their own protection. Therefore, when a blind person applies to purchase a ticket, being himself unknown to the agent, and that ticket is refused, the carrier is not liable by this act alone to be mulcted in damages; but, as before indicated, if the agent of the carrier knows, of his personal knowledge, of the competency to travel of the particular person, or if the fact of such ability is made known to him in any manner, and he still persists wantonly and arbitrarily in his refusal to sell the person desiring passage a ticket, the carrier may be made to respond in damages for his oppressive acts." In the case of *Croom v. C., M. & St. P. Ry. Co.* (Minn.) 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557, the rule is thus stated: "Of course, a railroad company is not bound to turn its cars into nurseries or hospitals, or its employees into nurses. If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent and made known to its servants, and renders said care and assistance necessary, the company is negligent if such assistance is not afforded." And in 5 Am. & Eng. Ency. of Law, 538: "While persons who are ill have a right to enter and travel upon conveyances of a common carrier of passengers, nevertheless the

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carrier is not bound to accept as a passenger, without an attendant, one who, because of physical or mental disability, is unable to take care of himself." We think it a proposition too obvious to admit of refutation that the blind man who, without an attendant, successfully makes a long railroad journey involving several changes of cars, does so either because he is especially cared for and helped on his way by the kindness of chance acquaintances or by the aid of the employees of the carrier. Let any one imagine a totally blind man alighting on a strange platform for the purpose of changing cars amid the confusion arising from the shifting of trains, the blowing of whistles, the clanging of bells, the rolling of baggage trucks, and the hurried tramp of the feet of his fellow passengers, and he will need no extraneous evidence to realize that the afflicted passenger will be totally helpless, as well as in the most immediate danger of harm, without the kindly aid of some one who is not devoid of sight. The duty of the carrier of passengers for hire is to attend to the comfort and safety of all of its passengers alike, but not to furnish especial attention to any one in particular, unless, perhaps, under exceptional circumstances, such as accidental sickness or misfortune en routs. If the carrier accepts a helpless passenger without an attendant, it will doubtless assume the additional care and responsibility commensurate with his misfortune and needs; but this is a burden it must assume for itself. The law does not impose it as an incident to the business.

The undisputed facts of the case at bar are that the appellee was, as already said, totally blind and 77 years of age. He desired to be transported for a distance of from 140 to 185 miles (depending upon which of two routes he took), involving two, if not three, changes of the vehicles of transportation; one of the changes being to take a steamboat ride of 20 miles up the Ohio river. On both occasions that he came to the appellant's agent in regard to the proposed trip he was led by an attendant, and under these circumstances the agent firmly, but politely, refused to sell him a ticket unless he had an attendant. We think entirely immaterial that appellee was in the habit of taking occasional short trips on appellant's road without an attendant. These involved no change of cars, and furnish no evidence of his ability to take the trip under contemplation. But we think appellee's own evidence abundantly shows that he was dependent upon the assistance of others even on these short trips. In speaking of these, in answer to a question of his counsel as to whether or not he traveled by himself, he said: "Folks on the train I was traveling on always helped me, if I needed help, and I was put off where my ticket called for. I would go often." Again: "Well, I generally visit the county seat about four to six times a year, and most of the time I come by myself. Sometimes somebody comes with me, and often I would come by myself and go to other places, too. Somebody would see me on the train and help me off, or the conductor would see me off." Speaking

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of his return home from Ullen, he said: "I got on the C., E. & I. road and went on that road to Mt. Vernon, and there the road was a mile to the t'other—a mile from one depot to the t'other one—and I made the change from one end of the town to the t'other. Went with a friend of mine. Got acquainted with the gentleman, and he said he would see me across from one depot to the t'other; and the gentleman went to the train with me, and I remained there awhile, and then went to Nortonsville, and then went to White Plains that night." All of this shows that what he means by going by himself without an attendant is that he went by himself, depending on the assistance of chance acquaintances or the help of the employees of the carrier. No one would think of disputing that a blind man who is put on a car can sit in his seat until he reaches his destination, if no change of cars is required. This involves no greater ingenuity than sitting in his own chair at home for a given length of time; and undoubtedly, if at his destination some one (perhaps the conductor) puts him safely off onto the platform, he will be so far all right. But this is not what we would term traveling without assistance. Certainly, if one can be sure of the attentions of chance acquaintances, or of the help of the employees of the carrier, he need not hire attendants to conduct him on his journey; but may he ask the carrier to run the risk of his getting this chance help? We think not. Suppose he should fail to meet any one sufficiently charitable to help him, and he should be injured; would it not be said with a great show of reason that, the carrier having accepted him as a passenger, knowing his infirmity, it therefore owed him a duty commensurate with protecting him from harm? This, we think, would clearly be the correct rule of law applicable to the supposititious case. It would seem to follow as a necessary consequence that the carrier has the legal right to protect himself from this additional responsibility by requiring the infirm traveler to secure the services of an attendant prior to starting on his journey.

We do not think it important that the appellant had promulgated a rule upon the question in hand, although, if it were, the existence of the rule was established without contradiction. The rule at best is only for the guidance of the employees. The corporation could not limit its duties and responsibilities to the public by an edict to its servants; and, unless the justifying principle of law be underneath it, the rule is void. The right of the company to protect itself from the additional hazard of transporting a blind man on a (considering his infirmity) to him perilous journey does not rest on a rule of its own, but on a controlling principle of law. It follows, from the view we have taken of the law of the case, that a peremptory instruction should have been awarded appellant at the conclusion of the testimony, and that it is unnecessary to review the other interesting questions raised by appellant on the record.

Wherefore the judgment is reversed, for proceedings consistent with this opinion.

HUNTER *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Sept. 6, 1905.)

[51 S. E. Rep. 860.]

Carriers—Injury to Passenger—Contributory Negligence.*—Where a passenger on a train at night passed from one coach to another and by the conductor and porter, who were in the rear car, in search of water, and stepped off the back platform of the rear coach, thinking he was going into another, there being no light or guard chain on such rear car, he cannot recover for the injuries received; the proximate cause of the injury being his own negligence.

Appeal from Common Pleas Circuit Court of Clarendon County; Purdy, Judge.

Action by Robert Hunter against the Atlantic Coast Line Railroad Company. From a judgment sustaining demurrer, plaintiff appeals. Affirmed.

A. Levi and W. C. Davis, for appellant.

J. T. Barron and Wilson, Du Rant & Muldrow, for respondent.

WOODS, J. The defendant demurred to the complaint in this case on the ground that it failed to state facts sufficient to constitute a cause of action, in that: "(1) The allegations of fact in the complaint do not show any actionable negligence. (2) The allegations of the complaint show contributory negligence on the part of the plaintiff. (3) The complaint shows that the gross negligence of the plaintiff, in wrongfully going upon an alleged dangerous and improperly lighted platform, was the direct and proximate cause of the injury to plaintiff." The demurrer was sustained, and the plaintiff appeals, relying on the following allegations of the complaint as stating a good cause of action: "(2) That on or about the 18th day of August, 1903, the defendant received the plaintiff into one of its railroad trains running between the places hereinafter mentioned, and then and there undertook and agreed to safely carry and convey him therein as a passenger, from Manning, S. C., to Savannah, Ga., and return, for two dollars, paid by plaintiff to one E. W. Dines, who

*For the authorities in this series on subject of the contributory negligence of passengers in passing from one car of a train to another, see foot-note appended to *Dougherty v. Yazoo & M. V. R. Co.* (Miss.), 13 R. R. R. 327, 36 Am. & Eng. R. Cas., N. S., 327.

For the authorities in this series on the question what is, and is not the proximate cause of an injury, see foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237; foot-notes appended to *Birmingham Ry. Light & Power Co. v. Brantley* (Ala.), 15 R. R. R. 191, 38 Am. & Eng. R. Cas., N. S., 191; *Snow v. New York, etc., R. Co.* (Mass.), 15 R. R. R. 47, 38 Am. & Eng. R. Cas., N. S., 47; *Illinois Cent. R. Co. v. McIntosh* (Ky.), 14 R. R. R. 738, 37 Am. & Eng. R. Cas., N. S., 738; *Glassey v. Worcester Con. St. Ry. Co.* (Mass.), 14 R. R. R. 736, 37 Am. & Eng. R. Cas., N. S., 736; *Wabash R. Co. v. Billings* (Ill.), 14 R. R. R. 203, 37 Am. & Eng. R. Cas., N. S., 203.

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was a manager of an excursion from Sumter, S. C., to Savannah, Ga., and return; said train being in charge of and under the control of the servants and employees of the defendant. (3) That the train on which the plaintiff was riding as a passenger, under said contract to safely transport him, was in an insecure, dangerous, and unsafe condition, in that there was no chain or guard rail on the rear platform of the last car of said train, where passengers walk in passing from one car to another, and there was only a very dim light in said car and none upon the rear of said car. (4) That at the time of the injury hereinafter referred to the train of defendant was at some point on its line between Santee River and Ashley Junction, and the conductor and porter of said train were sitting near the rear of the last car of said train, and in a position where they could see plaintiff as he approached the rear of said car, and they did not warn him of the dangerous condition of the rear platform of said car. (5) That it was the duty of the defendant to provide its cars with drinking water for its passengers, and to keep them so provided, but it negligently failed so to do, and this plaintiff, becoming thirsty after eating a lunch provided by the defendant in one of its cars near the front of its said train, sought a drink of water in all of its cars, going back towards the rear of the train, and, finding none up to and in what plaintiff afterwards learned was the last car of the train, he attempted to pass on to what he believed was a car in the rear of this car, when, because of the carelessness and gross negligence of the defendants, its servants, and employees, in failing to properly light its said car and rear platform, and to warn plaintiff of the dangerous condition of the rear platform, and to provide the said chain or guard rail, as it was in duty bound to do, the plaintiff walked off the rear of said car and was violently hurled to and precipitated upon the crossties, iron rails, and track of defendant, breaking both of his arms, one of his legs in two places, and the knee-cap of the other leg in three places."

We extract from the argument of appellant's counsel the six particulars in which it is charged the defendant was negligent: "(1) A failure to provide drinking water for this passenger; (2) an improperly lighted last car; (3) no lights on rear platform; (4) a failure to provide a chain or guard rail on rear platform; (5) a failure to warn plaintiff of dangerous condition of rear platform, although conductor and porter were sitting where they could see actions of plaintiff, and in a few feet of the danger he was going into; (6) negligent and wanton conduct in leaving plaintiff upon track after being notified of his accident by friends." It is the duty of a railroad company to provide drinking water for passengers, and it cannot be said it would be negligence under ordinary circumstances for a passenger to go from one coach to another, if necessary, in search of water. It is also the duty of a railroad company to provide safe platforms as a means of ingress and egress from its passenger cars. Passengers already on the cars are not invited or expected, how-

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ever, to use the rear platform of a train while it is in motion, and it is not the duty of railroad officials to request persons apparently in their senses not to take the risk of doing so. As was said in *Jarrell v. Ry. Co.*, 58 S. C. 491, 494, 36 S. E. 910, 912: "The train was not at any station or place where persons are invited to use the platform as a means of entering or leaving the car, when, as to such persons, the defendant would owe the duty to so light the platform and landing as to insure safety in their use. Under the circumstances in this case the defendant owed no duty to plaintiff to light up the platform and adjacencies outside the car for his benefit." Plaintiff, having the notion that there was another car in rear of the one he was in, walked out into the dark and off the platform. There is no pretense that the defendant did any positive act tending to delude the plaintiff into supposing there was still another car behind that from which he fell. On the contrary, his failure to see in front of him any car or any light in a car was express notice to the plaintiff that he had reached the end of the train; and when, in the face of the warning of the absolute darkness which met him at the car door, the plaintiff went on, he recklessly and blindly took his life into his own hands. We do not see how the dim lights in the car could be regarded a proximate cause of the fall. If they had been brighter, they might have made the absence of any car in the rear still more manifest; but without this aid the darkness was sufficient warning to stop any reasonable man. The proximate cause of the injury plainly was the plaintiff's own want of care. "The complaint not showing that the injury was caused by any act of omission or commission of the servants of the railroad company, or from any defects in the instrumentalities of transportation, there is no presumption of negligence on the part of the defendant. *Steele v. Ry. Co.*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756. But, if such presumption existed, it is completely rebutted by the allegations of the complaint, which show the injury was due to plaintiff's own recklessness or negligence." Assuming, however, for argument's sake, that the defendant was guilty of breach of duty to the plaintiff in all the particulars set out in the complaint, it is manifest the injury would not have been received but for the negligence of the plaintiff in endeavoring to step from one car into another without having any reason to believe there was another car. The plaintiff thus shows that his own negligence at least contributed to the injury as a proximate cause.

The sixth paragraph of the complaint, alleging breach of duty by the conductor in not backing the train, and endeavoring to find plaintiff when he was missed, was not considered by the circuit judge, and has not been brought before this court by the exceptions.

The judgment of this court is that the judgment of the circuit court be affirmed.

SOUTHERN RY. CO. *v.* JOHNSON.

(Supreme Court of Alabama, June 30, 1905.)

[39 So. Rep. 376.]

Carriers—Injuries to Person Boarding Train—Negligence—Evidence.*—Plaintiff, shortly before a train on which he intended to take passage was due to leave a station, went into a saloon, where he met the conductor, who asked him if he was going on it. Plaintiff replied that he was, and the conductor said, "All right!" and left the place. Plaintiff remained until the train was pulling out, when he ran and tried to board it while it was running at the rate of from one to three miles an hour, but fell and was injured. He testified that, when he undertook to take hold of the railing of the car, the train gave a jerk and threw him back; the jerk being caused by putting on more steam. Held insufficient to prove actionable negligence on the part of the railroad company, because of the failure to show that plaintiff was a passenger, or to prove that the jerk was anything more than was necessary in the movement of the train.

Appeal from Circuit Court, Shelby County; A. H. Alston, Judge.

"To be officially reported."

Action by Reuben Johnson against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

The evidence showed, in effect, that the plaintiff came to Calera for the purpose of there taking the defendant's train for his home; that, shortly before the train was due to leave, he went into a saloon on the opposite side of the railroad track from

*For the authorities in this series on the question who are, or are not, passengers, see foot-notes appended to *Quantz v. Southern Ry. Co.* (N. Car.), 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259; foot-notes appended to *Fremont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Garvey v. Rhode Island Co.* (R. I.), 15 R. R. R. 30, 38 Am. & Eng. R. Cas., N. S., 30; *Dallas Rapid Transit Co. v. Payne* (Tex.), 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25; *Holmes v. Birmingham Southern R. Co.* (Ala.), 14 R. R. R. 815, 37 Am. & Eng. R. Cas., N. S., 815; *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380; *Birmingham Ry., Light & Power Co. v. Bynum* (Ala.), 13 R. R. R. 683, 36 Am. & Eng. R. Cas., N. S., 683; *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; *McNeill v. Durham & C. R. Co.* (N. Car.), 13 R. R. R. 647, 36 Am. & Eng. R. Cas., N. S., 647; foot-notes appended to *Foster v. Seattle Electric Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640; *Hudson v. Lynn & B. R. Co.* (Mass.), 13 R. R. R. 622, 36 Am. & Eng. R. Cas., N. S., 622.

For the authorities in this series on the subject of the liability of carriers for injuries to passenger caused by sudden movements of cars, see foot-note appended to *Faul v. North Jersey St. Ry. Co.* (N. J.), 15 R. R. R. 694, 38 Am. & Eng. R. Cas., N. S., 694; *Reagan v. St. Louis Transit Co.* (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; foot-notes appended to *Field v. Delaware, L. & W. R. Co.* (N. J.), 9 R. R. R. 653, 32 Am. & Eng. R. Cas., N. S., 653; foot-notes appended to *Yazoo & M. V. R. Co. v. Humphrey* (Miss.), 11 R. R. R. 1, 34 Am. & Eng. R. Cas., N. S., 1.

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the depot of the defendant; that there he met the conductor of the train, who asked plaintiff if he was going on it, and, on plaintiff saying he was, the conductor said, "All right!" and in a minute or two left the saloon. The plaintiff remained there until the train was pulling out, when he ran out and tried to board the train while it was moving at the rate of from one to three miles an hour. He fell, and was injured.

Henry McDaniel and Pettus & Jeffries, for appellant.

SIMPSON, J. In this case the evidence produced by the plaintiff himself shows that the plaintiff remained in a saloon, not connected with the railroad depot or waiting rooms, until the train had started and was running from one to three miles per hour, according to the statement of different witnesses, and then ran, took hold of the railing of the caboose, but fell. The only evidence of anything in regard to the movement of the train, which might have caused the fall of plaintiff, was his statement that, when he undertook to take hold of the other railing with his left hand: "It gave a sudden jerk and threw me back. They were putting on more steam or something like that. It went faster, when it gave that sudden jerk, and jerked my left hand loose. It swung me around behind the train and I fell." In the first place there was no proof that the jerk was anything more than what was proper and necessary in the movement of the train; but, on the contrary, the plaintiff himself states that "they were putting on more steam or something like that," which was evidently the proper thing to do in moving the train. In the next place the relation of passenger had never been established, and the defendant was not under any special obligation to the plaintiff. Even if the casual conversation in the saloon, between plaintiff and the conductor, could have been understood as an agreement to receive plaintiff as a passenger, which it was not, it could only mean that he would be received when he boarded the train in a proper manner, and could not authorize him to remain in the saloon until after the train had started, and then run and attempt to board it while it was in motion. There is nothing in the evidence to show that any invitation was extended to him to board the train at this time, or even that any one in charge of the train had any knowledge of the fact that he was attempting to board it. Even if it were proved, which it was not, that it was customary for the caboose to be pulled up to the platform for passengers to get on, while a failure to do so might, under some circumstances, give a passenger who was left a right of action, yet it could not justify the action of the plaintiff in this case. *Jones v. B. & M. R.*, 163 Mass. 245, and note, 39 N. E. 1019; *Merrill v. Eastern R.*, 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; *Spanngle v. C. & A. R. R. Co.*, 31 Ill. App. 460; *Schepers v. Union Depot Ry. Co.*, 126 Mo. 665, 672, 674, 29 S. W. 712; *McMurty v. L. N. O. & T. Ry.*, 67 Miss. 601, 7 South. 401; *Webster v. Fitchburg R.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Browne v. Railroad*, 108 N. C. 34, 43, 12 S. E. 958;

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McLaren v. Ala. Mid. Ry., 100 Ala. 506, 14 South. 405; N. Birmingham Ry. Co. v. Liddicoat, 99 Ala. 545, 552, 13 South. 18. It results that the court erred in refusing to give the general charge in favor of the defendant, on written request.

The judgment of the court is reversed, and the cause remanded.

MCCLELLAN, C. J., and TYSON and ANDERSON, JJ., concur.

GLENN v. LAKE ERIE & W. R. Co.

(Supreme Court of Indiana, Oct. 6, 1905.)

[75 N. E. Rep. 282.]

Carriers—Passengers—Termination of Relation.*—The relation of passenger and carrier does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged.

Same.*—A passenger, on arriving at his destination, voluntarily and without any necessity therefor, went into the depot waiting room with some acquaintances and engaged in social converse for 10 or 15 minutes, after which he left the depot, and in passing over the station grounds fell and was injured. Held, that the relation of passenger and carrier had as matter of law terminated at the time of the injury, and no recovery therefor could be based on such relation.

Appeal from Circuit Court, Warren County; Jos. M. Rabb, Judge.

Action by James Glenn against the Lake Erie & Western Railroad Company. From a judgment for defendant, plaintiff appeals. Transferred from the Appellate Court (73 N. E. 861) under Burns' Ann. St. 1901, § 1337j, subd. 2. Affirmed.

Thompson & Storms and *C. V. McAdams*, for appellant.

Jno. B. Cockrum and *Stuart, Hammond & Simms*, for appellee.

*For the authorities in this series on the question who are, and are not, passengers, see *Quantz v. Southern Ry. Co.* (N. Car.), 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259; foot-notes appended to *Fremont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Garvey v. Rhode Island Co.* (R. I.), 15 R. R. R. 30, 38 Am. & Eng. R. Cas., N. S., 30; *Dallas Rapid Transit Co. v. Payne* (Tex.), 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25; *Holmes v. Birmingham Southern R. Co.* (Ala.), 14 R. R. R. 815, 37 Am. & Eng. R. Cas., N. S., 815; *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Wash.), 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380; *Birmingham Ry. Light & Power Co. v. Bynum* (Ala.), 13 R. R. R. 683, 36 Am. & Eng. R. Cas., N. S., 683; *Rowdin v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 672, 36 Am. & Eng. R. Cas., N. S., 672; *McNeill v. Durham & C. R. Co.* (N. Car.), 13 R. R. R. 647, 36 Am. & Eng. R. Cas., N. S., 647; foot-notes appended to *Foster v. Seattle Electric Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640; *Hudson v. Lynn & B. R. Co.* (Mass.), 13 R. R. R. 622, 36 Am. & Eng. R. Cas., N. S., 622.

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MONTGOMERY, J. This action was brought by appellant to recover for a personal injury caused by falling over a railroad tie upon appellee's station grounds. The cause was tried by a jury, and, after hearing the evidence and argument of counsel, the court by a peremptory instruction directed the jury to return a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and an exception duly saved, and that ruling is assigned as error on appeal.

Appellant resided at the town of Dayton, and at the time of receiving his injury was returning from a trip to the city of Lafayette. The complaint is in a single paragraph, and charges that appellant was a passenger over appellee's road from Lafayette to Dayton, and arrived at his destination after night, and in going from the depot toward the business part of town in the darkness fell over the obstruction and broke his leg. Appellant's right of action is manifestly founded upon the relation of passenger and carrier, and if that relation did not exist between him and the appellee at the time of the accident there can be no recovery upon the complaint. The rule is that the relation of passenger and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged. Elliott on Railroads, vol. 4, § 1592; McKimble v. Boston R. R. Co., 139 Mass. 542, 2 N. E. 97; Houston & T. C. R. Co. v. Ratchler (Tex. Civ. App.) 83 S. W. 902; Chicago & Alton Ry. Co. v. Tracey, 109 Ill. App. 563; Chicago, R. I. & P. Ry. Co. v. Wood, 104 Fed. 663, 44 C. C. A. 118. In case of an accident involving a passenger, who on alighting from the train intended and desired to depart from the place at once, but was hindered and delayed, the question as to what is a reasonable time should be determined from the attendant facts and circumstances given in explanation or excuse for such delay. In this case appellant, on arriving at Dayton and leaving the train, had no apparent desire to proceed on his journey, and offered no legitimate excuse for lingering about the station; but it appears from his own statement that he voluntarily went into the waiting room of the station with six or seven acquaintances, sat down, talked, joked, sang a song, and had a jolly time for 10 or 15 minutes. He was not detained after leaving the car by any business with the company or connected with his journey, or by any circumstance which made delay either necessary or expedient, but abstained from proceeding homeward to secure amusement for himself and to furnish entertainment for his companions. After 10 or 15 minutes thus jovially spent, appellant left the depot, and in passing over the station grounds fell and was injured. The admissions of appellant, as well as the other evidence, make it clear that he merely loitered for an unreasonable time about the station for his own pleasure, and it was wholly unnecessary to ask the jury to determine as a question of fact whether or not 10 or 15 minutes was an unreasonable time for him to have remained at the place where he was dis-

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charged as a passenger from appellee's train. The court, upon the undisputed facts, could say as a matter of law that, upon his arrival at the station, appellant of his own volition, in quest of pleasure, broke the continuity of his journey, and thereby terminated at once his relation as appellee's passenger. Appellant's right of recovery, as pleaded, depended upon proof of a breach of duty owing by appellee to him as its passenger, and, that relation having terminated before the accident occurred resulting in his injury, his suit must fail. The court did not err in directing a verdict for appellee. *Heinlein v. Boston & P. R. Co.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; *Quantz v. Southern Ry. Co. (N. C.)* 49 S. E. 79; *Ratteree v. Galveston H. & S. A. Ry. Co. (Tex. Civ. App.)* 81 S. W. 566.

The conclusion reached makes it unnecessary to consider any other questions discussed by counsel. There was no error in overruling appellant's motion for a new trial.

The judgment is affirmed.

LINDSAY v. WABASH RY. CO.

(Supreme Court of Michigan, Sept. 19, 1905.)

[104 N. W. Rep. 656.]

Assault and Battery—Pleading—Variance.—A declaration in trespass vi et armis justifies proof of the commission of an assault by a railway conductor while preventing a person from boarding a train after he had been ejected for his refusal to pay fare, and the proof may show a justification.

Same.—A declaration in trespass vi et armis, which alleges that because of the assault plaintiff was injured, and became sick and disordered, and so remained for a month, during which time he was deprived of social enjoyment with his friends and suffered bodily pain, and was obliged to undergo medical treatment, does not authorize a recovery for aggravation of plaintiff's mental disorder.

Same.—A declaration in an action against a railway company for an assault committed by a conductor in ejecting plaintiff from a train for his refusal to pay fare, which alleges the assault and the resulting physical injuries, does not authorize a recovery for negligence of the conductor in failing to discover plaintiff's mental derangement.

Carriers—Ejecting Passenger—Assault—Justification.*—A railway conductor ejected a passenger at a station for his refusal to pay fare. The conductor asked him to get off, and, when he did not, the conductor lifted him to his feet, when he walked out. The train started, but was stopped because the passenger attempted to board it. When the train started again, the conductor got on the rear platform of the last car. The passenger took hold of the railing, and the conductor was unable to loosen his grip, and struck him, causing

*For the authorities in this series on the question whether a carrier is liable for insults to and assaults upon its passengers by its employees, see foot-notes appended to *Illinois Cent. R. Co. v. Winslow (Ky.)*, 14 R. R. R. 432, 37 Am. & Eng. R. Cas., N. S., 432; foot-notes appended to *O'Brien v. St. Louis Transit Co. (Mo.)*, 14 R. R. R. 413, 37 Am. & Eng. R. Cas., N. S., 413.

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him to fall. Held, that the conductor was justified in doing what he did.

Assault and Battery—Declaration—Evidence.—A declaration in trespass did not claim damages for an aggravation of an existing mental disorder. The evidence showed that the assault was committed by a railway conductor while ejecting plaintiff from a train for his refusal to pay fare, and was justified, with the exception of an alleged blow given after plaintiff was off the train. There was no evidence showing the violence of this blow, or that it affected plaintiff's mental condition. Held, that evidence of plaintiff's subsequent mental condition was inadmissible.

Error to Circuit Court, Lenawee County; Guy M. Chester, Judge.

Action by Thomas Lindsay, by Nannie G. Lindsay, next friend, against the Wabash Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued before MOORE, C. J., and CARPENTER, MCALVAY, OSTRANDER, and HOOKER, JJ.

Watts, Smith & Baldwin, for appellant.

John E. Bird and John L. O'Mealey, for appellee.

HOOKER, J. The plaintiff's declaration is in trespass vi et armis, and alleges that he attempted to enter defendant's train at Milan, Mich., as a passenger, when one of defendant's servants, acting within the scope of his employment as conductor of said train, attempted to and did prevent his entering the train, and pulled and dragged him about, and struck him many blows with his fists, and choked him, by means whereof the plaintiff then and there became and was greatly hurt, cut, bruised, and wounded in and about his head, neck, hands, arms, and legs, and became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, one month then next following, and during all of which time plaintiff was deprived of social enjoyment with his friends, and suffered great bodily pain and distress, and was obliged to undergo medical and surgical treatment. Defendant's brief states that there is no allegation in the declaration that the plaintiff was mentally unsound, and no claim for damage by reason of the aggravation of his mental disease occasioned by the treatment complained of. The defendant pleaded the general issue, and added a notice that, if plaintiff was assaulted, it was by reason of his persistent attempt to ride upon defendant's car without paying his fare.

The testimony given upon the trial shows that prior to May 15, 1902, plaintiff lived at St. Louis, Mo., and had been a conductor upon the Missouri Pacific Railroad, but, showing symptoms of softening of the brain, he was discharged. On May 29, 1902, he moved with his family to Port Huron, Mich., and on that day he took a train at Port Huron and went to Detroit, and in the same afternoon he left Detroit on the defendant's train. While occupying a seat in the sleeper the conductor asked him for his ticket, and he replied that he had none. He said he was going to St.

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Louis. The conductor told him that he would have to pay his fare to Montpelier, and change at that place for the St. Louis train. He then said that he had no money, and was told that he would have to get off at Milan. The train stopped at Milan, and he was asked to get off; but he did not, and the conductor lifted him to his feet, when he walked out. The porter took out his grips. The train started, but was again stopped because plaintiff attempted to get on board. When the train started again, the conductor got upon the rear platform of the diner, the last car on the train. The plaintiff took hold of the railing, and the conductor was unable to loosen his grip. The train was gaining speed, and the conductor struck him on the jaw or side of the face, and in so doing lost his balance, and both fell to the platform. The conductor got up and caught the train, which proceeded on its way. The plaintiff's counsel claim that the plaintiff was upon the first step of the car, and that the conductor struck plaintiff after they fell from the car. The foregoing is defendant's version of the affair. Plaintiff's counsel say that, when the porter saw that the plaintiff was going to try to get upon the train after being ejected, he closed the doors to the vestibule of that car, which made it impossible to get on there, but that he then got on the first step of the rear entrance of the diner, holding his baggage in one hand, and holding onto the hand rail with the other. The train was moving five or six miles an hour, when the conductor felled him with a severe blow behind the ear, and he fell upon the station platform upon his face, the conductor falling upon him. A lady witness testified that she thought he struck him after he fell upon him. The conductor then got up and got upon the train. Plaintiff got up and sat down by a restaurant near by, pale, and with chin and knuckles bleeding. One day later, May 30th, he took the train at Milan. He did not pay his fare, and was put off at Cone. He stayed there until evening, when he took a train to Britton. He was taken from Britton to the Hotel Gregg at Adrian, where he stayed until the following Monday, when his wife took him to Port Huron, where he remained until July 11th, when he was taken to the Pontiac Asylum.

The declaration contained no hint that plaintiff was an ejected passenger seeking to re-enter the cars. Neither did it indicate that he was mentally disordered, or claim damages for the causing or aggravation of any mental disorder. We are of the opinion that the simplest kind of a declaration in trespass vi et armis would have justified the proof of the encounter, and of any physical injuries inflicted upon the plaintiff, and that it was not necessary to allege in the declaration the facts of his efforts to ride, his refusal to pay fare, his ejection, and persistent effort to board the train. Those matters were competent proof, and might constitute a justification of the assault; but there was no variance between pleading and proof in that regard. It was not competent under this declaration to claim or prove damages for aggravation of a mental disorder, and, if plaintiff claimed

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damages for negligence of the conductor in failing to discern his infirmity, the declaration was not such as to support such claim. Plaintiff's counsel say that they disavowed a claim for such damages, and that the court did not permit their recovery. Under the undisputed proofs in this case the conductor was justified in doing all that he did to the plaintiff, except to strike him after he fell upon the platform, if he did so. Whether or not a blow was then justifiable may have been a question for the jury, dependent upon the circumstances and emergencies of the situation.

Error is alleged upon the admission of proof from which the jury may have found that a pre-existing mental disorder was aggravated by the conductor's assault; the declaration containing no hint of such a claim. According to the proof received, the plaintiff was previously mentally disordered, in fact deranged, and became worse afterwards, and the claim was made that his disorder was aggravated by the assault. We have already seen that under the proofs the only fault that can be justly ascribed to the conductor was the blow said to have been given after the men fell from the train. Not only is it far from clear that such blow was given, and, if given, that it was not necessary or justifiable under the circumstances, but there is no proof whatever as to the character or violence of the blow, or that tends to show that it had any such effect upon plaintiff's mental condition. If there was any aggravation of such disorder, it is much more likely to have been caused by the justifiable blow dislodging plaintiff from the train than from this questionable act of the conductor upon the platform. It has been held in several cases that such proof is not admissible, and that such damages are not recoverable unless alleged in the declaration. See *Thurstin v. Luce*, 61 Mich. 298, 28 N. W. 103; *Wilkinson v. Steel Works*, 73 Mich. 409, 41 N. W. 490; *Hunter v. Durand* (Mich.) 100 N. W. 191; *Phippen v. Bay City Ry.*, 110 Mich. 351, 68 N. W. 216. The court stated that "nothing was claimed, except a straight assault and battery, and that nothing could be claimed for plaintiff's mental condition; that he stood there in the case as if he were mentally sound." Yet his mental condition both before and after the occurrence was shown, and a physician was permitted to testify, in substance, that a blow on the head would be likely to aggravate the disorder.

It is urged that it was competent to show his previous condition and appearance as affecting the question of the reasonableness of the conductor's conduct; but, if this be so, it was not competent to show plaintiff's subsequent condition by the hotel keeper who saw him two days later, or to make such proof as that given by the physician referred to.

There are other assignments of error, but we think it unnecessary to discuss them, as the question may not arise upon another trial.

The judgment is reversed, and a new trial ordered.

JOYCE *v.* LOS ANGELES RY. CO.

(Supreme Court of California, July 3, 1905.)

[82 Pac. Rep. 204.]

Carriers—Street Car—Duty to Stop for Passenger.—Where a passenger on a street car arose from her seat and stepped onto the step while the car was standing still, and either the motorman or conductor observed such act, it was sufficient notice of her desire to alight.

Same—Contributory Negligence.*—Where, while a street car was standing, a passenger stepped onto the step of the car, and while there it moved suddenly forward, owing to the negligence of the conductor, whereby the passenger was injured, she was not guilty of contributory negligence, unless an ordinarily prudent person would not so have done.

Same—Burden of Proof.†—Where a passenger on a street car, while it was standing, stepped down onto the step, with a view of leaving the car, and while in the act of alighting the operatives caused the car to start, so as to injure her, the facts showing a prima facie case of negligence.

Same—Contributory Negligence.‡—A passenger on a street car cannot recover for injuries sustained in consequence of her voluntarily alighting from the car when it was in motion.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Annie Joyce against the Los Angeles Railway Company. Judgment was rendered in favor of defendant, and plaintiff appeals from an order denying her a new trial. Affirmed.

Win. Wylie and Waters & Wylie, for appellant.

Bicknell, Gibson & Trask, for respondent.

VAN DYKE, J. The action is to recover damages for personal injuries alleged to have been sustained by the plaintiff in alighting from a car of the defendant company, in consequence of the sudden starting of the car when in such act of alighting therefrom. The case was tried before a jury, and, upon a verdict in favor of the defendant, judgment was rendered accordingly. The appeal is taken from the order denying plaintiff's motion for a new trial.

*For the authorities in this series on the question of the degree of care required of passenger for his own protection, see foot-note appended to *Parks v. St. Louis & S. Ry. Co.* (Mo.), 14 R. R. R. 387, 37 Am. & Eng. R. Cas., N. S., 387.

†For the authorities in this series on the subject of the presumption of negligence arising from the fact that a passenger is injured, see foot-note appended to *Fagan v. Rhode Island Co.* (R. I.), 16 R. R. R. 22, 39 Am. & Eng. R. Cas., N. S., 22; foot-notes appended to *Redmon v. Metropolitan St. Ry. Co.* (Mo.), 15 R. R. R. 248, 38 Am. & Eng. R. Cas., N. S., 248; foot-notes appended to *Lincoln Traction Co. v. Webb* (Neb.), 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369.

‡See foot-note appended to *Chicago Union Traction Co. v. Hanthorn* (Ill.), 15 R. R. R. 19, 38 Am. & Eng. R. Cas., N. S., 19.

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The appellant urges two points on the appeal, to wit: First, that the evidence is insufficient to justify the verdict; second, error in modifying certain instructions asked by the plaintiff, and in giving certain instructions asked by the defendant.

The testimony shows that the car upon which plaintiff was riding left Main street, in Los Angeles, on its journey to the easterly boundary of the city, on First street, and that it stopped at the westerly line of Alameda street; and plaintiff claims that while she was making her exit therefrom, and in the act of stepping from the steps of the car to the street, the employee operating the car, without warning, and knowing her dangerous position, caused the car to be suddenly jerked, thereby throwing her from the step to the ground.

1. The evidence on the part of the defendant shows that the plaintiff asked the conductor to stop at Hewitt street, and he told her that he would. Thereafter, when the car reached Vine street, a lady passenger alighted from the car, and the plaintiff asked the conductor, "Is this Hewitt street?" and he replied, "No; it is three blocks further." The next crossing going easterly is Alameda street, on which the Southern Pacific Company operates its steam railroad. It is the custom before crossing the steam railroad track for the conductor to go forward and ascertain whether the car can safely cross, and in obedience to this custom the conductor of this car, when it approached the west line of Alameda street, left the car and went forward to ascertain whether any trains were approaching the crossing of First and Alameda streets. He left on the right side of the car and went forward, and, finding it safe to proceed, looked back to see whether there was anyone in the act of alighting from the car, and gave the motorman the signal to go ahead, whereupon the motorman rang the bell and started the car. Thereafter, while the car was in motion, the plaintiff, without any notice to or knowledge of either the conductor or the motorman that she intended to leave said car at that point, alighted therefrom on the left-hand side, and, in consequence thereof, was injured. It further appears from the evidence that before she attempted to alight she was warned by one of the passengers not to do so. He testifies: "I thought maybe she was going to get off before the car stopped, and I said to her, 'Wait a minute.' The car was in motion, and she didn't pay any attention to me, but got off. I stayed on the car. The conductor went back to assist her in getting up." It also appears from the evidence that her intended destination was Hewitt street, a distance of two blocks east of Alameda street. She, however, gives as an excuse for alighting at Alameda street, that she had concluded to walk the remainder of the distance, although it was some 8 o'clock in the evening at the time of the accident. Without going further into the particulars in reference to the testimony given, it is sufficient to say that, so far from the evidence failing to support the verdict, as contended by the appellant, it appears that the defendant's version as to how the accident occurred is supported by a preponderance of the evidence.

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2. It is contended on the part of the appellant that the court erred in modifying instruction No. 5, requested by the plaintiff. Plaintiff's instruction No. 5, as modified by the court, is as follows; the insertions being indicated by the portions in parentheses:

"If the jury find from the evidence that the plaintiff arose from her seat and stepped down onto the step with intent of alighting while the car was standing still (and that such act was observed by the motorman or conductor), such act was a sufficient notice to the employees in charge of said car of her desire to alight therefrom; and if the jury (further) believe that, while she was in the act of alighting, the car was suddenly started through the negligent act of the employee in charge of said car, (and) the plaintiff was thereby thrown to the ground and injured, she is entitled to recover."

In plaintiff's instruction No. 6, as modified by the court, the insertions also appear in parentheses, while the omitted portions are indicated by italics, as follows:

"If the jury believe from the evidence that the car came to a stop, and that while it was standing still the plaintiff stepped down onto the step of the car with the intent of alighting therefrom, and that while on said step the car moved suddenly forward in consequence of the negligent act of the conductor or motorman, and she was thereby thrown off and injured, and if they further believe that (the conduct of) the plaintiff *did* under the circumstances *what an ordinarily prudent woman would have done* (was that of an ordinarily prudent person), then she was not guilty of contributory negligence, and would be entitled to recover."

Instructions Nos. 1, 2, and 3, requested by the plaintiff and given by the court, are as follows:

"(1) If the jury believe from the evidence that the plaintiff exercised ordinary care, and that the defendant failed to exercise the utmost care and diligence of a very cautious person, and that, by reason of the failure to exercise such utmost care and diligence of a very cautious person, the plaintiff was injured, then the plaintiff would be entitled to recover.

"(2) If the jury believe from the evidence that the plaintiff was a passenger and had paid her fare on the car in question, and that she exercised that degree of care which a person of ordinary care and prudence would have exercised under the circumstances, and that the defendant failed to exercise the utmost care and diligence of a very cautious person, and that, by reason of the failure to exercise such utmost care and diligence of a very cautious person, plaintiff was injured, then the plaintiff would be entitled to recover.

"(3) If the jury find from the evidence that the plaintiff was a passenger and had paid her fare on the car in question, and that while the car was standing still she arose from her seat and stepped down onto the step, with a view of leaving the car, and while in the act of alighting the defendant's servants caused the

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car to start forward with a jerk, which caused her to fall, whereby she was injured, she has established a prima facie case of negligence in the management of the car, and the burden of proof, which primarily rested on her, was uplifted, and the burden of disproof thrown upon the defendant."

No. 4 is in reference to the measure of damages in case a verdict should be rendered for the plaintiff.

The appellant also contends that the court erred in giving the first instruction requested by the defendant, to wit:

"(1) The court instructs the jury that, to entitle the plaintiff to recover in this action, it must appear from the evidence that the injuries sustained by the plaintiff were occasioned by the carelessness or negligence on the part of defendant or its servants or employees as charged in the complaint, and were not the result of the plaintiff's own fault; and if you believe from the evidence that the plaintiff was injured in consequence of her voluntary alighting from the car of defendant, at the time of the accident, when it was in motion, then your verdict should be for defendant."

Also in giving the second instruction as modified by the court (the modification appearing by italics) as follows:

"(2) No presumption of negligence on the part of defendant's employees arises from the fact that the plaintiff was injured by alighting from the car of the defendant. *If you find that she did so alight, voluntarily, while the car was in motion.*"

We think the instructions as a whole fairly presented the case to the jury upon the evidence introduced at the trial, and fully guarded the rights of the plaintiff and appellant. The preponderance of the evidence shows, and the jury evidently so found, that the injury to the plaintiff was caused by her own negligence in attempting to alight from the car while it was in motion, and, this being so, she could not properly recover. In *Campbell v. Los Angeles Ry. Co.*, 135 Cal. 137, 67 Pac. 50, it is said: "The court found 'that plaintiff's injury was due wholly to his stepping off the car while it was still in motion, and such injury was not occasioned by the negligence of defendant.'"

* * * We think the plaintiff is not entitled to recover on the above facts. The defendant did not commit any breach or omission of legal duty. *Donovan v. Ferris*, 128 Cal. 54, 60 Pac. 619, 79 Am. St. Rep. 25. The motorman quickly and promptly stopped the car when last requested by plaintiff. It was stopped in a safe place. Plaintiff was warned not to get off until it had stopped. It is difficult to imagine what greater care could have been exercised by defendant." It is said in *Booth on Street Railway Law*, § 337: "But it has been held to be negligence per se, which justifies a nonsuit, to step off the car while it is being slowed up, in order to stop in response to a passenger's request, or when incumbered by a load or bundle." In a late case before the Supreme Court of New York (*Saffer v. Dry Dock, etc., R. Co.* [Sup.] 5 N. Y. Supp. 701), the defendant had requested the lower court to give the following instruction,

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which was refused: "If the jury believe that, while the car was being slowed up in order to stop in response to the plaintiff's request, the plaintiff, without waiting for the car to be stopped, stepped off the car while in motion, and thereby sustained his alleged injury, then the plaintiff was guilty of contributory negligence, and the defendant is entitled to a verdict on that ground." The court on the appeal held that the instruction stated the law correctly, and should have been given. In the opinion of the court it is said: "If he got off while the car was in this rapid motion, then it was negligence; and, if he did anything in the way of getting off the car which helped or contributed to bring about the injury, then there was contributory negligence on his part, and he was not entitled to recover." It is said in Schouler on Bailments & Carriers (3d Ed.) § 662: "Thus a railway passenger is not justified in jumping from the train while it is in motion, even though the carrier was negligent, whether in carrying him past the station, or in starting before he had due opportunity to land." In *Craven v. Central Pac. R. Co.*, 72 Cal. 347, 13 Pac. 878, this court said: "Did the plaintiff, at the very time of the accident, negligently jump off the train while it was moving, and thus cause or contribute to the injury? If she did not, then the verdict should have been for plaintiff. If she did, then there can be no doubt that her negligence contributed proximately to the injury. It was the very thing which then and there directly and immediately caused it."

Under the circumstances the court below was justified in denying plaintiff's motion for a new trial.

. Order appealed from affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

REYNOLDS v. GREAT NORTHERN RY. CO.

(Supreme Court of Washington, Sept. 15, 1905.)

[82 Pac. Rep. 161.]

Carriers of Live Stock—Actions for Injury—Complaint—Sufficiency.—A complaint in an action against a carrier of live stock from one state to another, which alleges that the stock was injured by being confined in cars for a longer period than 28 consecutive hours without unloading for rest, food, and water, though not prevented from being unloaded by storms or other accidental causes, shows a violation of Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995], making it the duty of railways carrying stock from one state to another to unload the stock after confinement for a period of 28 consecutive hours for rest, food, and water, and hence shows negligence per se.

Appeal—Review—Harmless Error.—The Supreme Court, reviewing a cause tried to the court without a jury, reviews it de novo, and disregards matters of evidence or pleadings which are immaterial, and an error in refusing to strike immaterial allegations in a pleading is harmless.

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Carriers of Live Stock—Interstate Shipment—Exemptions from Liability—Validity of Contract.*—A provision in a contract of shipment of live stock from one state to another, exempting the carrier from liability for a loss by reason of a violation of its duty to unload the stock for rest, water, and food, as required by Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995], is void.

Same—Construction of Contract.—A provision in a contract of shipment of live stock from one state to another, which stipulates that the shipper shall unload the stock at his own risk at any place the same may be unloaded for any purpose, does not relieve the carrier for a breach of duty to unload for rest, water, and food, as required by Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995.]

Same—Duty in Respect to Delivery.—It is the duty of a carrier of live stock to deliver the same to the consignee in inclosed yards, convenient to the place of unloading.

Same—Contract of Shipment—Construction.—Where a shipper of live stock did not know that there were no yards at the place of destination for unloading, the provision in the contract of shipment that he should unload at his own risk must be construed as made with reference to unloading where there are proper facilities.

Same—Claim for Injury to Stock—Time of Presentation.—A contract of shipment of live stock stipulated that a claim for damages, unless presented within 10 days from the date of unloading, at destination, should be waived. The shipper, on the day after unloading, informed the carrier's agent at that point that he wanted to put in a claim for damages. The agent told the shipper to see another agent on paying the freight. The shipper did so, and that agent told him to see another agent. The shipper within 10 days made an oral claim to the latter agent, who requested a written statement, which was furnished after the expiration of the 10 days. Held, that the claim for damages was made within the time specified.

Same—Notice of Claim of Injury—Sufficiency.†—A shipper's claim for damages recited that he had sustained a loss of a specified number of cattle shipped, that the cattle scattered at the place of unloading, and that some of the cattle were lost, for which he offered a reward. Held sufficient to support a claim for the cost of recovering the lost cattle and the depreciation in their value.

Appeal from Superior Court, Spokane County; Geo. W. Belt, Judge.

Action by J. E. Reynolds against the Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. J. Gordon and Charles A. Murray, for appellant.

Merritt & Merritt, for respondent.

MOUNT, C. J. This action was begun by respondent to recover damages for loss of certain live stock shipped from Heppner,

*For the authorities in this series on the question whether a carrier of live stock can limit its liability, see foot-note appended to *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596; *Ragsdale Harper & Weathers v. Southern Ry. Co.* (Ga.), 12 R. R. R. 120, 35 Am. & Eng. R. Cas., N. S., 120 (injuries from viciousness of animals or defects in cars).

†For the authorities in this series on the subject of notices of claims against railroad companies, see foot-notes appended to *Baltimore & O. R. Co. v. Hubbard* (Ohio), 16 R. R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71; *Smith v. Chicago, M. & St. P. Ry. Co.* (Wis.), 15 R. R. R. 180, 38 Am. & Eng. R. Cas., N. S., 180.

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Or., to Marian, Mont. The complaint alleges, in substance, that the plaintiff loaded 12 cars with cattle at Heppner Station in Oregon, to be transported to Marian, Mont.; that the cattle were loaded on the cars of the Oregon Railroad & Navigation Company, at 8 o'clock a. m. on the 18th day of May, 1903, and were transported over the line of the said Oregon Railroad & Navigation Company to Spokane, Wash., where they arrived at 11 o'clock p. m. on the same day; that said cattle were thereupon transferred and received by the appellant, and were forwarded by it on its line at 1:30 o'clock a. m. on the 19th day of May, 1903, and arrived at the station at Marian, Mont., at 9 o'clock p. m. of the 19th day of May; that the said cattle were not being carried in cars where they could have proper food, water, space, and opportunity to rest; that they were confined in said cars for a longer period than 28 consecutive hours without unloading for rest, water, and food, and that appellant was not prevented from unloading said cattle by storms or other accidental causes; and that by reason of the long delay and said cattle being confined in said cars they became run down, and 18 of them, of the value of \$490, died. The complaint further alleged that at the time the cattle arrived at Marian it was a dark night, there were no stock pens or any other appliances necessary or in which said cattle could be confined and kept, and by reason of the darkness of the night it was impossible for respondent to confine said cattle in any inclosure; that said cattle wandered away, and became scattered and lost throughout the country surrounding said town, and that respondent incurred an expense of \$145 in collecting them together again; that a part of said cattle so scattered and lost could not be found for a long time, and they depreciated in value in the sum of \$106. Respondent claimed damages in the sum of \$741. Appellant interposed a demurrer to the complaint, which was overruled by the court. Appellant thereupon answered, admitting shipment of the cattle, but alleging that it had no knowledge of the hour when they were shipped from Heppner, and that said cattle arrived at Marian at 8:25 o'clock p. m. on the 19th day of May, 1903, and denying the other allegations of the complaint. The answer alleged affirmatively that the cattle were delivered to the Oregon Railroad & Navigation Company under the terms and conditions of a contract in writing, signed and entered into between the respondent and the railroad company, as follows:

“The Oregon Railroad & Navigation Company.

“(Original) Limited Liability Live Stock Contract No. 34.

“(Read this Contract)

“Heppner, Oregon, Station, May 18, 1903.

“This agreement, made this 18th day of May, 1903, by and between the Oregon Railroad & Navigation Company, hereinafter called the ‘carrier,’ and J. E. Reynolds, of Heppner, hereinafter called the ‘shipper,’ witnesseth:

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"That the said shipper has delivered to the said carrier 12 cars of cattle consigned to J. E. Reynolds, at Marian, Montana, destination, via Spokane, to be transported upon the conditions hereinafter set forth, over the line of the Oregon Railroad & Navigation Company, to Spokane, and there delivered to the consignee, owner, or order; or to such company or carrier (if the stock is to be forwarded beyond said station) whose line may be considered a part of the route to destination, it being understood that in and about the delivery of said stock to such connecting carrier the Oregon Railroad & Navigation Company acts only as agent for the consignee or owner, and that the liability of each carrier hereunder shall cease and terminate upon delivery of said stock to the next connecting carrier, the consignee or owner.

"It is expressly agreed that this contract and the responsibility of all the carriers over whose lines the shipment may pass is limited and controlled by the conditions herein contained, which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable. It is further agreed and understood that the person delivering to this company the shipment or any part thereof described herein is authorized to sign this contract for and on behalf of the shipper, with full power in the premises.

"Notice.

"Blooded animals, or animals deemed especially valuable, will be carried only on special contract, and railroad agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignor and the railroad company or its duly authorized agent.

"Men only in charge of stock may accompany the same upon the rules and regulations set forth in circulars issued by the railroad company, and upon executing the release of liability printed on the back hereof.

"Agents of the railroad company are expressly forbidden to contract, for delivery of live stock at any specified time, or for any particular market; and no agent of any carrier may under any circumstances alter, change, or modify, or agree to alter, change, or modify, any of the terms of this contract. Special contracts can only be made by the general freight agent, with whom the agent, upon request of the shipper, will communicate by wire. This document must be presented without alteration or erasure. Said shipper, for himself, the consignee, or owner, agrees to pay or guaranty the freight thereon at the rate of \$..... tariff * * * per standard car of 29 to 30½ feet in length (subject to established per cent. decrease or increase applicable to cars of less or greater length), \$..... per hundred pounds (subject to established minima for cars of varying lengths), as shown by limited liability tariffs governing, which rate is less than the regular tariff rate for the transportation of live stock at carrier's risk, and is given said shipper at his special

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request, in part consideration of his agreement to the limitation of the liability of the railroad company as a common carrier upon the terms and conditions herein set forth, which are accepted and agreed to by the shipper as just and reasonable; it being understood that each and every condition of this agreement shall inure to the benefit of each and every carrier over whose line said stock may pass under this contract.

"In consideration of the special reduced rate herein provided for the transportation of the live stock above described, it is hereby stipulated and agreed as follows:

"(1) The carriers shall not be liable for the loss or death of or for any injuries received by any of said stock unless the same is the direct result of willful misconduct or actual negligence of said carriers, their agents, servants, or employees.

"(2) It is expressly agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to wit: Horses, mules and jacks, not exceeding \$100 per head; oxen, bulls or steers, not exceeding \$50 per head; cows, not exceeding \$30 per head; hogs or calves, not exceeding \$10 per head; sheep or lambs, not exceeding \$3 per head; and in no event shall the carriers' liability exceed \$1,000 upon any car load, such valuation being those whereon the rate of compensation to said carriages for their services and risk connected with the transportation of said live stock is based.

"(3) The shipper agrees to load and reload all said stock at his own expense and risk, and to feed, water, and tend the same at his own expense and risk while it is in any stockyards, whether the same be operated, owned, or controlled by said carriers or otherwise, and while on the cars or at feeding points, or at any place where the same may be unloaded for any purpose whatever.

"(4) The shipper assumes the exclusive duty of properly and securely fastening said stock in the cars, and of removing them therefrom, and of keeping such cars, and any inclosure in which said stock may be confined, securely locked or fastened to as to prevent escape of stock therefrom. The shipper agrees to inspect the cars in which said stock is to be transported, and any yards or inclosures on the premises of the railroad company into which said stock may be unloaded, and satisfy himself that they are sufficient and safe and in proper order and condition, and shall report to the agent or employees of said carriers any visible defects therein, and demand necessary repairs, before proceeding to occupy said cars or inclosures, and the fact of his loading said stock into said cars or occupying said inclosures shall be an acknowledgment and acceptance by him of the sufficiency and suitability in every respect, of said cars and inclosures for the shipment and yarding thereof; and he hereby assumes all risk of injury which said live stock or any of them may receive in consequence of any of them being wild, unruly, weak, maiming each other or themselves, by or in any consequence of heat or suffocation, or any other ill effects of being crowded or injured, by the burning of straw, hay, or other material loaded with or used

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for feeding the stock or otherwise, and also all risk of damage which may be sustained by reason of delay in transportation, and all risk of escape of any portion of said stock, or loss or damage from any other cause or thing not resulting from the willful negligence of the carriers, their officers, agents, or employees.

“(5) If the carriers, or any of them, shall furnish any laborers to assist in loading or unloading said stock at any point, no additional charge being made therefor, such laborer or laborers shall while so engaged be deemed exclusively the employees of the shipper, and no carrier shall in any event be liable for any act or thing done or omitted to be done by such laborer or laborers in connection with said stock while so engaged.

“(6) If the car or cars wherein said stock is to be transported shall be furnished by the shipper and tendered to the carrier for that purpose, said shipper assumes all risk for, in, and about said car or cars, and no liability or responsibility shall attach to any carrier or carriers under this contract arising from or growing out of any insufficiency or defect in the condition of any such car or cars.

“(7) No carrier shall be liable for any loss or damage to said stock by causes beyond its control, by floods, fire, quarantine, disease, riots, strikes, or stoppage of labor, shrinkage in weight, changes in weather, heat, cold, or any other cause not directly the result of gross negligence on the part of said carriers, their agents, and servants.

“(8) The shipper expressly agrees to load, unload, and care for said stock while upon the cars or premises of the carriers in a careful and humane manner, in strict compliance with the laws of the United States and of each and every state through which said stock may be transported.

“(9) Unless claims for loss, damage, or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. Any carrier liable on account of loss or damage to any of said stock shall have the benefit of any insurance that may have been effected thereupon.

“(10) The rules, regulations, and conditions prescribed by the carriers for the transportation of live stock, as evidenced by their published tariffs, classifications, and circulars in force and effect, are binding upon the shipper. The signing of this contract by the shipper or his agent shall be conclusive evidence of knowledge, assent, and agreement to each and every stipulation and condition thereof by said shipper.

“Witness my hand.

J. E. Reynolds,
“Shipper.

“The Oregon Railroad & Navigation Company,

“By J. M. Kernan, Station Agent.”

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The answer further alleged that said shipment was received by appellant from the Oregon Railroad & Navigation Company at Spokane, on the 19th day of May, 1903, and was transported from Spokane to Marian with all possible dispatch, without any misconduct or negligence on the part of defendant, its agents, servants, or employees, and that said cattle were at said station of Marian delivered to the respondent on the 19th day of May, 1903, at 8 o'clock p. m., mountain time, and were there and then received by him, and no claim for loss or damage, or detention was presented by the plaintiff within 10 days from said 19th day of May, 1903, nor before said stock was mingled with other stock, and alleged that any claim for loss or damage to or detention of said stock had been waived by the respondent, and was barred by the terms and conditions of said contract. To this answer the respondent replied, alleging, among other things, that he had no knowledge or information sufficient to enable him to form a belief as to whether or not said cattle were received for shipment and transportation by said railroad company under and according to the terms and provisions of the contract set out in the second paragraph of said affirmative defense, and therefore denies all that portion of said paragraph relating to said contract, and alleging the fact to be that whatever contract was signed by said respondent was signed for the purpose of getting said cattle transported, and without any knowledge or information on the part of the respondent as to the contents of the said contract, or any of the provisions therein contained. Respondent also, by a further and affirmative reply, alleged that, when he signed the contract, he did so without knowledge of its contents or conditions; that, if he signed said contract at Heppner, the cattle were not received by appellant and transported upon the conditions of said contract, but that at Spokane a new contract was made with appellant, the contents of which were unknown to respondent; that if respondent made said contract with the Oregon Railroad & Navigation Company, containing provisions that he should present any claim for loss within 10 days, said condition was unreasonable and unenforceable, and was contained in the contract without his knowledge; that, if said contract contained any condition or provision that he should assume all risk of damage by delay, such a condition was unreasonable and unenforceable; that in the transportation of said cattle they were delayed for a period of more than 28 consecutive hours without unloading for rest, water, and feeding, and that appellant was not prevented from unloading said cattle by storms or other accidental causes, and that said cattle did not have proper room and space for feeding and rest in the cars, contrary to the laws of the United States of America; that a great deal of time was consumed between Spokane and Marian by the cars in which the cattle were contained being detained upon side tracks; that after said cattle were unloaded at Marian said respondent was delayed for a period of 10 days in gathering the cattle together, because they were unloaded upon the open prairie; that, as soon

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as it was possible for respondent after the said cattle were found, he presented himself to the agent of the railroad company at Marian, and was by said agent directed to present the matter to the agent of the company at the city of Spokane, whereupon he proceeded to the city of Spokane and informed the agent, Jackson, of his losses, and that they were to the extent of \$1,000; that said agent, Jackson, advised him to proceed to his home and write a letter as to the amount of his losses; that thereafter, on the 2d day of June, 1903, in pursuance of said instructions from said agent, Jackson, respondent did write a letter in which he informed said Jackson that his losses and damages were \$1,000; that the actual loss on account of cattle that had died was \$490; that subsequent to the time of writing said letter he found nearly all of the cattle, and that at the time when found they had depreciated in value. Appellant filed a motion to strike out certain portions of the reply of the respondent on the ground that the matter contained therein was sham, frivolous, and irrelevant. This motion was denied. Thereupon the case was set for trial, and by consent of the parties was tried to the court without a jury. At the conclusion of the trial, the court made findings in favor of the respondent, and entered a judgment in his favor for the full amount prayed for in the complaint.

It is unnecessary to set out the findings in this opinion. Appellant first contends that the complaint is not sufficient, because it is not alleged that 28 hours is an unreasonable time to confine cattle in transit without unloading said cattle for rest, water, and food, and that it is not shown that there was any unnecessary delay, or that there was any reason stated why appellant should have unloaded the cattle for rest, water, and food, or that appellant was negligent in any manner. The federal statute, found at section 4386, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2995], makes it the duty of railways carrying cattle from one state to another to unload such cattle after confinement for a period of 28 consecutive hours for rest, food, and water, unless prevented from so unloading by a storm or other accidental causes. "And, although a penalty is imposed for a violation of this regulation, nevertheless a failure to comply therewith is negligence per se, rendering the railroad company liable to the shipper for resulting injuries to animals." 6 Cyc. p. 439, and authorities there cited. Under this rule it was only necessary for the complaint to show a violation of the duty imposed by law and the resulting injury to the plaintiff. These facts were shown, and the complaint therefore states a cause of action.

Appellant argues at length in its brief that the court erred in refusing to strike out certain parts of respondent's reply to appellant's answer, because such parts were sham, frivolous, and immaterial. Such errors, if made by the lower court, are harmless here, for the reason that the cause was tried to the court without a jury, and the whole cause is therefore reviewable here de novo. In such cases this court disregards matters of evidence or pleadings which are immaterial. The argument of appellant

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upon the motion to strike parts of the reply is based upon the ground that the contract of shipment heretofore set out in full is a valid and binding contract.

Respondent claims that the contract is void because it is unfair, unreasonable, and not consistent with public policy. Conceding for the purpose of this case, without deciding, that the contract in question is a valid and binding contract, we still think the plaintiff is entitled to recover. There is no provision in the contract exempting the appellant from loss by reason of a violation of the duty to unload said cattle for rest, food, and water, as required by law. If there were such provision, it would certainly be void. There is a provision to the effect that the respondent should load and unload said stock at his own expense and risk at any place where the same may be unloaded for any purpose whatever; but this provision cannot be held to relieve the appellant for a breach of duty to unload for rest, food, and water, as required by law, and it is not claimed that an opportunity was given to the respondent to unload for those purposes, which he neglected or refused to avail himself of. It was also the duty of the carrier to deliver the cattle to the consignee in or through inclosed lots or yards convenient to the place of unloading. *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73. While the contract provided that the respondent should unload the cattle at his own risk, it did not provide for such unloading at a place where there were no facilities therefor. The evidence shows that respondent did not know that there were no yards or pens or other facilities at the place of destination for unloading the said cattle, and he was not informed thereof. His contract, therefore, must be construed as made with reference to unloading where there were the usual and proper facilities for such work. There were no facilities for unloading at the place of destination, and none were furnished. By reason thereof respondent's cattle were scattered, and he was put to extra expense to gather them again. We think there is no provision in the contract which, reasonably construed, would waive loss on this account.

Appellant also contends that respondent waived any claim for damages by failure to present a claim therefor within 10 days from the date of unloading said stock, as provided in the contract. The evidence shows that no written claim was presented until June 2, 1903. The stock was unloaded on May 19, 1903. The contract does not require the claim to be made in writing, or in any specified form. The evidence shows that on the next day after the stock was unloaded respondent talked with the agent at Marian, and told him that he wanted to put in a claim for loss, without mentioning any definite amount; that the agent told respondent to see the agent at Kalispell when he paid the freight; that respondent went to the agent at Kalispell to pay the freight, and talked with him about the claim for damages, and the agent there directed respondent to see Mr. Jackson at Spokane; that two or three days prior to June 2, 1903, re-

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spondent saw Mr. Jackson, who requested him to write a letter, and that he, Jackson, would thereupon attend to the matter right away. Thereupon, on June 2, 1903, respondent wrote the following letter:

“Arlington, Ore., June 2, 1903.

“Mr. H. A. Jackson—Dear Sir: I shipped a train of cattle from Heppner, Oregon, to Marian, Mont., on the 18th day of May. I left Heppner at 8 o'clock and 30 minutes in the morning, reached Spokane ten minutes to twelve in the night, and I was till after nine the next night getting to Marian, and had a loss of 18 head of cattle, 14 cows, 2 calves and two yearling steers, which were worth \$490, and I make claim for that amount. The train should have reached Marian before noon on the 19th, and I would have been \$1,000 better off if it had, for the cattle scattered on me trying to get them to pasture in the night, and it took several days of time and expense to get what I got, and there is still 35 head lost that I have offered \$2 per head for. I think you can see my situation. Should you want any further proof of what I say, your people at Marian and also W. F. Hubbart, of Hubbart Cattle Co., Kalispell. Your services were good, only I was kept sidetracked almost half of the time I was on your line with the train. Whose fault it was I don't know. There is a chance to do a lot of business in that section, and if this claim is settled and I get the service in future that I have reason to believe you can give, there is nothing in the way of doing a good deal of business in the future.

“Hoping to hear from you in the future, I am yours very truly,

“[Signed]

J. E. Reynolds.”

This claim for damages was within time under the contract. On the next day after the cattle were unloaded, respondent notified appellant's agent that he desired to make a claim for damages. Appellant's agents cannot be permitted to put respondent off from one time to another, and finally be heard to say that no claim was made in time, especially when respondent was asking to make a claim within the time limited. It is true the claim which was sent to the agent of the company in writing made direct demand for only \$490, the damage then actually known. But it is also stated that there were still 35 head lost, which respondent had offered \$2 per head for. We are of the opinion that this was sufficient to support the finding of damages for the item of gathering and depreciation in value of lost cattle.

Finding no error in the record, the judgment appealed from is affirmed.

DUNBAR, ROOT, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

ABEL v. NORTHAMPTON TRACTION CO.

(Supreme Court of Pennsylvania, May 24, 1905.)

[61 Atl. Rep. 915.]

Carriers — Passenger on Street Car — Injuries — Presumptions.*— Where a person is unable to find room on a summer car other than on the running board, and is killed in collision with another car while riding thereon, a presumption of negligence arises against the company, and the burden is on it to rebut it.

Same—Contributory Negligence.†— In an action against a street railway company to recover for the death of a passenger killed while riding on the running board of a summer car, the court could not say as a matter of law that plaintiff's intestate was guilty of contributory negligence, though there was evidence that at the time of the collision he was standing on the track by the side of the car.

Death by Wrongful Act—Action by Wife—Defenses.— The fact that a wife, suing for the death of her husband, had prior thereto consulted counsel as to the matter of divorce, is no defense.

Same—Evidence.— Where, in an action for the death of plaintiff's husband, there was evidence that his earning capacity was small, it was not error to admit evidence that his father had been in the habit of assisting the wife.

Carriers—Injury to Passenger—Evidence.— In an action for the death of a passenger by collision between two street cars, evidence as to the effect of the collision on the other passengers is immaterial.

Appeal from Court of Common Pleas, Northampton County.

Action by Cora A. Abel against the Northampton Traction Company. Judgment for defendant, and plaintiff appeals. Reversed.

George Lehman, a witness for plaintiff, was asked this question: "Q. Was there a man at Fourth and Northampton streets, Easton, announcing that there was a train provided by the trolley company? A. During the early part of the day? Q. Yes. A. Yes, sir." Objected to as immaterial and irrelevant. The Court: "The objection is overruled and bill sealed for plaintiff."

Lawrence P. Meyers was asked this question: "Q. What were your instructions? A. My instructions was to go to the corner of Fourth street at 11 o'clock in the morning to make an announcement to take the cars— Objected to, for the same reason

*For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises from the fact that a passenger is injured, see foot-note appended to *Fagan v. Rhode Island Co. (R. I.)*, 16 R. R. R. 22, 39 Am. & Eng. R. Cas., N. S., 22; *Redmon v. Metropolitan St. Ry. Co. (Mo.)*, 15 R. R. R. 248, 38 Am. & Eng. R. Cas., N. S., 248; foot-notes appended to *Lincoln Traction Co. v. Webb (Neb.)*, 14 R. R. R. 369, 37 Am. & Eng. R. Cas., N. S., 369.

†For the authorities in this series on the question whether it is contributory negligence for a street car passenger to ride on the running board, see foot-note appended to *Ft. Wayne Traction Co. v. Hardendorf (Ind.)*, 15 R. R. R. 738, 38 Am. & Eng. R. Cas., N. S., 738; foot-note appended to *Wheeler v. South Orange & M. Traction Co. (N. J.)*, 15 R. R. R. 52, 38 Am. & Eng. R. Cas., N. S., 52.

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that we objected to the testimony of Mr. Lehman; that it is irrelevant and immaterial as to what took place at Fourth and Northampton streets, and also what took place at the park—what announcements were made by the witness at the park with reference to taking the railroad train in preference to the trolley.” The Court: “The objection is overruled and bill sealed for plaintiff.”

Defendant’s witness, Wilbur Bender, was asked this question: “Q. Was he under the influence of liquor in the evening?” Defendant proposes to prove by the witness that at the time of the accident Percy Abel was in an intoxicated condition; also proposes to prove his habits, and frequent intoxication, for the purpose of illustrating the condition of his health and probable life, and as upon the question of contributory negligence. So much of the offer as relates to the offer to prove that he was intoxicated at the time of the accident, plaintiff objects to that as being immaterial and irrelevant to the issue. The Court: “The objection is overruled and bill sealed for plaintiff.” “Q. Did you see him talking to Mr. Hay? A. I did. Q. Did you hear what Mr. Hay said to him? A. I can’t recall the words. Q. Can you give us the substance of what he said? Did he say anything to him about taking the train?” Mr. Stewart: “This is objected to as immaterial and irrelevant. The testimony as to what occurred between Mr. Abel and Mr. Hay, which the witness says he overheard, is objected to as immaterial and irrelevant.” Mr. Fox: “This is to be followed by proof, by Mr. Hay, that he had this conversation with Mr. Abel and induced him to take this train, and actually took him to the train.” The Court: “The objection is overruled and bill sealed for plaintiff.”

Mr. Zinn was asked this question: “Q. What was the arrangement you made with reference to the train?” Mr. Fox: “Defendant proposes to prove by the witness that he was a member of the committee of the labor union that arranged with the officers of the trolley company with reference to the transportation of the crowd that day, and that the arrangement included provision for a steam train, to be followed by proof that the labor union also arranged to have Mr. Meyers there for the purpose of announcing to the public generally the provisions that were made for the accommodation of the public.” Objected to as immaterial and irrelevant what arrangement was entered into by the labor union and the railroad company with reference to transportation of the crowds to and from the park. The Court: “The objection is overruled and bill sealed for plaintiff.”

Thomas A. H. Hay was asked this question: “Q. Did the traction company pay the entire cost of the running of the train? A. We paid the entire cost.” Objected to for the same reason, the amount paid and who it was paid to, as utterly incompetent and irrelevant. The Court: “Same ruling and bill sealed for plaintiff.”

Plaintiff was asked this question: “Q. After you went to

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Philadelphia, did you take some steps towards procuring a divorce? A. No; I did not. Q. Not at any time prior to his death? A. Only at one time I asked what could be done with reference to that. I never applied for a divorce." Objected to, as not cross-examination. The testimony would be incompetent and irrelevant for any purpose at any time in the case. The Court: "The objection is overruled and bill sealed for plaintiff."

Plaintiff's witness, C. J. Abel, on cross-examination was asked this question: "Q. After that time did you contribute to her support in any way? A. Well, I paid some money out of my own pocket. He wouldn't pay it. Q. You paid some of the alimony out of your pocket? A. Yes, sir." Objected to as not cross-examination. The Court: "The objection is overruled and bill sealed for plaintiff." Mr. Stewart: "Plaintiff offers to prove by the witness that at the time of the collision, when the decedent, Percy Abel, was struck by the car coming from Easton, that other passengers were injured by the same collision." Objected to as incompetent and irrelevant, and as not a part of the *res gestæ*, and that it would tend to raise collateral issues as to which the court in the action now pending could not inquire. The Court: "The objection is sustained and bill sealed for plaintiff."

The court charged as follows: "Between 9 and 10 o'clock in the evening of Labor Day, 1902, plaintiff's husband was struck by a car of the defendant, receiving injuries from the effect of which he died a few hours later. The present action has been brought to recover damages for the loss thus sustained, on the theory that it was occasioned by the negligence of the defendant. I do not think there is any evidence that would justify you in finding that the injury complained of was the result of defendant's negligence. But, even if the fact were otherwise, it is clear that the negligence of the deceased contributed to the injury. The only eyewitnesses of the accident were two women, friends of the deceased, who stood near him at the time, both of whom testify that when he was struck he was standing on the track over which the offending car was moving. There is no evidence that he was forced into this position, or that it was not his own voluntary selection. True, these women were defendant's witnesses. It is also true that one of the plaintiff's witnesses testified that a very short time, if not immediately, before the accident the deceased was standing on the running board of a crowded car pointed in a different direction from the offending car; but this witness did not see the accident, and frankly admitted that he did not know where the deceased was standing when it occurred. This leaves wholly uncontradicted the testimony of the two women, which, if believed, and no reason has been assigned why it should not be believed, clearly establishes contributory negligence on the part of the deceased. But this is by no means the only evidence bearing upon the question of contributory negligence. The accident happened at a station erected by the defendant company near a pleasure resort known

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as 'Bushkill Park.' On the opposite side of the park, and also near to it, the D., L. & W. R. R. Co. had a branch road, leading, as did the defendant's road, to Easton, the home of the deceased. The defendant, anticipating a great crowd upon the capacity of its cars, hired a train of cars from the D., L. & W. Co., to ply between the park and Easton on the day in question, and also constructed a well-defined path, lighted at night by electricity, leading through the park to the D., L. & W. trains. The fare on both roads was the same. The defendant also employed L. P. Meyers, familiarly known for his stentorian voice, to announce from time to time the existence and movements of these trains, and this was done at the defendant's station and in the park during the evening. Moreover, Mr. Hay, the president of the defendant company, met the deceased, whom he had known from childhood, a very short time before the accident, and advised him to take the train for safety, and walked with him a short distance in that direction; the deceased being somewhat under the influence of liquor. None of these facts are disputed, and it is not pretended that either the train or the path to it was unsafe, or that the train was unduly inaccessible. A clearer case of contributory negligence than is thus presented it would be difficult to conceive of. *Smith v. City of New Castle*, 178 Pa. 298, 35 Atl. 973; *Musselman v. Hatfield Boro.*, 202 Pa. 489, 52 Atl. 15, and many other cases. I therefore direct you to return a verdict in favor of the defendant."

The defendant presented this point: "(3) Under all the law and the evidence the verdict must be for the defendant. Answer: Affirmed."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POTTER, JJ.

Russell C. Stewart, Frank S. Busser, and Ira J. Williams, for appellant.

E. J. Fox and J. W. Fox, for appellee.

POTTER, J. This action was brought to recover damages for the death of plaintiff's husband, caused, as is alleged, by the negligence of the defendant company. After 9 o'clock in the evening of September 1, 1902, a trolley car crowded with passengers started from the platform at Bushkill Park on the return trip to Easton. A short distance from the end of the platform there was a switch and siding to enable the cars to pass at that point. As the inward-bound car approached the switch, another car, coming in the opposite direction from Easton, entered the switch and passed over the turnout towards the platform. Instead of stopping on the turnout, the latter car ran on towards the second switch, which it reached just as the inbound car was crossing it, and the result was a collision, by which several persons were injured. The outbound car struck the inbound one about the middle of the side, and the husband of the plaintiff was caught between the two cars and crushed so badly that he died in a few hours.

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The motorman of the colliding car testified that, as he approached the switch, so many persons jumped on the car and platform and crowded around him that he could not move and could not control the car. If it had not been for the crowd, he could have averted the accident. It was so dense that he could not move his arms so as to put on the brake. This, he said, was the cause of the accident. On behalf of the plaintiff, Harry Petty testified that at the time of the accident he was on the returning car, which was crowded; the seats being all filled, and also the running boards at the sides. He says he "saw the deceased, who was standing on the running board, just before he was hit"; that he "had his arms around the standard"; and that "the blow kind of turned him around." On cross-examination the witness said that, while he saw the deceased on the running board just before he was hit, he could not tell whether he was on the running board or on the ground when he was hit. Floyd Stem testified that he saw the car hit a person who was standing on the running board, but it turned his face so that he could not recognize him, and he was unable to say whether he was plaintiff's husband.

This was all the evidence offered by the plaintiff to show where her husband was standing when struck and injured. But it was sufficient, we think, to justify its submission to the jury. If the decedent was unable to find room upon the car, elsewhere than upon the running board, and if the defendant company accepted him as a passenger in that position, and was undertaking to carry him, he was entitled to protection. If he was thus struck and injured by the other car, the burden of showing that the accident was not caused by the negligence of the motorman of the colliding car was certainly upon the defendant company. In *Madara v. Electric Ry. Co.*, 192 Pa. 542, Justice Dean said (page 547, 192 Pa., 43 Atl. 995, at page 996): "If the accident had been apparently caused by the act of a stranger while the plaintiff was a passenger, as in *Railway Co. v. Gibson*, 96 Pa. 83 (a collision with a hay wagon), the burden would have been on her to show negligence on the part of the defendant. But when it arose from a collision between defendant's cars, operated on its own rails, the presumption of negligence arises, and the burden is on the defendant to rebut it." In *Thane v. Traction Co.*, 191 Pa. 249, the present Chief Justice said (page 253, 191 Pa., 43 Atl. 136, at page 137 [71 Am. St. Rep. 767]): "Cases where the car is crowded and no seat is available rest upon a different basis. There the traveler, if he is to get on at all, must stand on the platform, with its rods, etc., to hold by, or inside with a strap for that purpose. He is presented with a choice of evils, and his action must be judged by the jury, while, on the other hand, the carrier by receiving him undertakes and gives him assurance that it will take care of him and guard him against accident as far as the circumstances will permit." In *Bumbear v. Traction Co.*, 198 Pa. 198, 47 Atl. 961,

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where the plaintiff was injured while riding on the side step of a crowded open summer car, Justice Fell said (page 200 of 198 Pa., and page 961 of 47 Atl.): "When the passenger, by invitation of the conductor or with his knowledge and assent, and from necessity, because of the want of sitting or standing room within the car, rides on the side step, he is entitled to the same degree of diligence to protect him from dangers which are known and may readily be guarded against as are other passengers." Hence, if, in the present case, the deceased was upon the car when the collision occurred, the presumption of negligence arose, and the case was for the jury.

On the part of the defendant two witnesses were called, Catharine Nuttall and Sarah Thatcher, both of whom testified that the deceased was standing on the track alongside the car when he was struck, and was not upon the running board. The trial judge instructed the jury that the uncontradicted testimony of the two women, if believed, clearly established contributory negligence. In this statement we think there was error. Even if the decedent was standing upon the ground at the side of the car, this is not a place which the court could say as a matter of law was intrinsically dangerous. There was no reason, as we see it, why the decedent should have apprehended that the outbound car would continue to run out from the siding and over the switch, and would strike with its front end the side of the inbound car. In any event it was not for the court to say as a matter of law that the decedent was guilty of contributory negligence in assuming the position in which he was when struck by the car. Whether or not his conduct in this respect was negligent under the circumstances was for the jury.

Nor could the court have said that the failure of the deceased to patronize the steam railroad on the night of the accident, rather than the trolley, was contributory negligence. Both methods of conveyance were open to the public, and the deceased had a perfect right to exercise his choice. It would be strange indeed if the defendant company could charge any of its patrons with contributory negligence in using the facilities which it was offering to the public. We sustain the first, second, third, and fourth specifications. We consider the testimony irrelevant, which was admitted with reference to providing transportation on the steam railroad, and against the objection of plaintiff's counsel, as set forth in the fifth, sixth, eighth, ninth, and tenth specifications of error, and these assignments are therefore sustained.

The fact that plaintiff had consulted counsel as to her right to obtain a divorce did not affect her right of action in this case, and proof as to that matter was also irrelevant. The eleventh assignment is sustained. We see no error in permitting defendant to show on cross-examination that the father of deceased contributed to the support of the plaintiff. The direct examination had shown that the earning capacity of deceased was very

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small. Nor do we see that the effect of the collision upon other passengers was material or relevant in showing the extent and character of the injuries to the deceased. The twelfth and thirteenth specifications are therefore dismissed.

The judgment is reversed, with a venire facias de novo.

STAFSKY v. SOUTHERN RY. CO.

(Supreme Court of Alabama, April 11, 1905.)

[39 So. Rep. 132.]

Carriers—Conversion—Reshipment of Goods.*—Where a buyer, to whom goods are consigned, wrongfully refuses to receive them on their arrival within a reasonable time, the seller is authorized to rescind the sale, and the carrier is not guilty of conversion in complying with the seller's orders to ship the goods back to him.

Same—Estoppel—Declarations as to Title.—Where a carrier tenders goods to the consignee, and the latter denies ownership or obligation to receive the same, and the carrier, in reliance on such denial, returns the goods to the shipper on the latter's order, the consignee is estopped to sue the carrier for conversion.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"To be officially reported."

Action by C. Stafsky against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed. Rehearing denied June 30, 1905.

George Huddleston, for appellant.

Weatherly & Stokely, for appellee.

DENSON, J. This is an action of trover, brought by Stafsky, plaintiff, against the Southern Railway Company, defendant, on the 6th day of September, 1902, for the alleged conversion of a

*For the authorities in this series on the question what does, and does not, constitute conversion of freight by the carrier, see *Ryland & Rankin v. Chesapeake & O. Ry. Co.* (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279 (carrier cannot be charged with conversion of freight, on account of delay in delivery, if it is safely kept, unless there has been demand for, and refusal of delivery; *Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co.* (Mo.), 9 R. R. R. 299, 32 Am. & Eng. R. Cas., N. S., 299 (conversion where delivery to consignee without presentation of bill of lading or payment of draft); *Collins v. Illinois Cent. R. Co.* (Mo.), 3 R. R. R. 37, 26 Am. & Eng. R. Cas., N. S., 37 (sufficiency of evidence of); *Gulf, C. & S. F. Ry. Co. v. Darby* (Tex.), 2 R. R. R. 327, 25 Am. & Eng. R. Cas., N. S., 327 (conversion of wheat recovered and retained by carrier, during delay in carriage and delivery; note, 10 R. R. R. 481, 33 Am. & Eng. R. Cas., N. S., 481; *Baker v. Chicago, etc., Ry. Co.* (Iowa), 6 Am. & Eng. R. Cas., N. S., 772; *Downing v. Outerbridge Co.* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 861; *Gulf, C. & S. R. Co. v. Fowler* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 424.

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case of shoes. The case was tried by the court on the following agreed statement of facts, to wit: "On August 4, 1901, plaintiff purchased on three months' credit, from V. Rosenzweig, of New York City, one case of shoes of the value of \$123.75, which shoes were, on September 4, 1901, regularly shipped to him at Birmingham, Alabama, over defendant's line of railroad; that said shipment was received by defendant at its Birmingham station within a reasonable time, and proper and legal notice of such receipt given to plaintiff; that plaintiff thereupon refused to receive the consignment of shoes and to pay freight thereon on the ground that same had been unreasonably delayed in transit, which ground was not well taken, and that defendant, after such refusal, corresponded with V. Rosenzweig, the consignor, and on his request returned the shoes to him on May 1, 1902, and that defendant collected no freight charges on such shipment, and that defendant is a common carrier and railroad company; that plaintiff never paid said V. Rosenzweig for said goods." The court rendered judgment for the defendant, and the plaintiff appealed.

Appellant's contention is that, while he did not have any good reason for refusing to receive the goods, and notwithstanding he refused to receive them, yet he was the true owner of the goods, and that the appellee, under the facts in the case, could acquit itself of liability to plaintiff, after receiving the goods, only in two ways: First, by storing the goods in a warehouse at the expense of the owner; second, by a sale of them in conformity with the statute. Code 1896, § 4226. The true question in the case is not whether, by resorting to one of the two modes pointed out, the appellee could have acquitted itself of liability, but, under the agreed statement of facts, was it guilty of a conversion? Did it deal tortiously with the goods in such sort as to make it liable in this action by trover by appellant as for a conversion? "Conversion is the gist of an action of trover, and to support the action there must be a concurrence of the right of property, general or special, and of possession, or the immediate right of possession, in the plaintiff, at the time of the conversion." *Booker v. Jones' Adm'x*, 55 Ala. 266; *Bolling v. Kirby*, 90 Ala. 215, 7 South. 914, 24 Am. St. Rep. 789. "If defendant exercises a dominion over the property in exclusion or defiance of the plaintiff's right, that is a conversion, be it for his own or another's use." Authorities *supra*; *Conner v. Allen*, 33 Ala. 515; *Cooley on Torts* (1879) p. 448. It was the plaintiff's duty, upon the arrival of the goods at Birmingham, to have received them. This duty he declined to perform, notwithstanding the goods arrived within a reasonable time, and he was duly notified of their arrival. His refusal to receive the goods, he conceded and agreed, was without any foundation. Therefore the refusal to receive was wrongful. The defendant notified the shipper of the facts, and the shipper requested that the goods be shipped back to him, and on May 1, 1902, the request was complied with. A wrongful refusal to accept goods sold authorizes the seller to rescind the sale. 24 Am. & Eng. Ency. Law (2d Ed.) 1104, cc.,

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and authorities under note 5; 24 Am. & Eng. Ency. Law (2d Ed.) 1097 (Rescission) note 1. It is true that the seller might have sued the buyer (plaintiff) for the contract price at which the goods were sold, and there would have been no good defense to the suit; but, the goods not having passed into the actual possession of the purchaser, the seller might, upon the vendee not taking and paying for them, keep them as his own, and recover the difference between the market price at the time and place of delivery and the contract price. Benj. on Sales (6th Ed.) § 788, p. 769, and authorities cited under note "z"; *The Schooner Treasurer*, 1 Sprague, 473, Fed. Cas. No. 14,159; *Kearny Milling & Elevator Co. v. Union Pacific Ry. Co.* (Iowa) 66 N. W. 1059, 59 Am. St. Rep. 434. The evidence tends strongly to show that the defendant acted in perfect good faith in returning the goods, and that it was induced to return them by the declarations and conduct of the plaintiff. Defendant tendered the goods to plaintiff, and he, in effect, said they were not his, that he was under no obligation to receive them, and refused to receive them. In returning the goods under the circumstances shown by the agreed statement of facts, can it be reasonably said that the defendant acted in defiance of any right the plaintiff had, or that it exercised dominion over them to the exclusion of plaintiff's right? Acts in pais will operate an estoppel when the opposite party has been induced to act upon them; and we think, upon the agreed statement of facts, even waiving the question of plaintiff's title vel non, the judgment of the trial court is correct. *McGowen v. Young*, 2 Stew. & P. 160; *Nelson v. Iverson*, 17 Ala. 216; 1 Brick. Dig. p. 796, §§ 10, 11; *Ricketts v. Croom*, 102 Ala. 332, 14 South. 637; 3 Mayfield's Digest, p. 424, § 311.

The judgment of the city court is affirmed.

MCCLELLAN, C. J., and HARALSON and DOWDELL, JJ., concurring.

SHORES v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, July 28, 1905.)

[51 S. E. Rep. 699.]

Railroads—Obstructing Culvert—Liability of Lessee.*—Where the lessee of a railroad built an addition to a stone culvert erected by

*For the authorities in this series on the question whether the lessor is liable for his lessee's negligence, see foot-note appended to *Chicago & G. T. Ry. Co. v. Hart* (Ill.), 13 R. R. R. 579, 36 Am. & Eng. R. Cas., N. S., 579; foot-notes appended to *Chicago, etc., R. Co. v. Newell* (Ill.), 15 R. R. R. 706, 38 Am. & Eng. R. Cas., N. S., 706.

As to whether the lessee of a railroad is liable for its own negligence, see foot-note appended to *Hawkins v. Central of Georgia Ry. Co.* (Ga.), 11 R. R. R. 831, 34 Am. & Eng. R. Cas., N. S., 831, where all the preceding authorities in this series are collected.

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its predecessor, which gave way, damming up the waters of a creek, thereby destroying plaintiff's crops, the lessee was liable therefor.

Same—Action for Damages—Evidence.—In an action to recover for injuries caused by obstruction of a railroad culvert, evidence of the effect of the waters on other persons than defendant was admissible.

Appeal—Objections—Waiver.—An admission of erroneous evidence without objection is no ground for reversal.

Railroads—Obstructing Culvert.—In an action for injuries caused by obstruction of railroad culvert, if plaintiff's damages could have been relieved by ditches, it was competent to show that it was expensive and difficult.

Same—Liabilities of Lessor and Lessee.*—A railroad company is liable in damages for injuries caused by defects in an embankment built by it, but not for injuries caused by a change made by its lessee in removing an obstruction in a culvert.

Trial—Charge on Facts.—In an action for injuries caused by the obstruction of a culvert, an instruction that, if the lessor railroad company had created it, the lessee was not responsible, unless it maintained it after demand to abate it, and if the lessee held it as the person who originally constructed it, without any request to remove it, without any increase in the flow of water, it was not responsible, is not erroneous as a charge on the facts.

New Trial—Evidence.—Refusal of a new trial is not error, where there was evidence to sustain the verdict.

Appeal from Common Pleas Circuit Court of Spartanburg County; Buchanan, Judge.

Action by W. L. Shores against the Southern Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

C. P. Sanders, for appellant.

Horace L. Bomar, for respondent.

POPE, C. J. This is an action for damages brought by plaintiff against the defendant. The complaint stated the cause of action as follows:

"(3) That the plaintiff is seised in fee and possessed of a tract of land in said county and state, about one and one-half miles west of the town of Fairforest, on Foster's Meeting House Branch, containing 191 acres, more or less, 15 or 20 acres of which are valuable bottom lands on said branch and are situated about 300 yards below the point where defendant's line of railroad crosses said Meeting House Branch.

"(4) That some time during or about the month of June, 1901, through the carelessness, negligence, and unskillfulness of the defendant in not constructing and keeping proper culvert facilities for allowing the water in said Foster's Meeting House Branch, where the right of way of defendant's railroad crosses it to flow through the fill under the defendant's track, the water in said stream, swollen by rains, became dammed by defendant's fill and culvert, making a great pond of water, which finally caused said fill to give way, washing said lands of plaintiff, covering them with mud, sand, timber, and other debris from said fill, all of which was and is to plaintiff's damage in the sum of \$500."

*See foot-note on preceding page.

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The answer of defendant was as follows:

"(1) It admits the allegations contained in paragraphs 1 and 2 of the complaint, together with so much of paragraph 4 as alleges that a fill on defendant's line of road at or near Foster's Meeting House Branch was washed away along about the time mentioned in said paragraph.

"(2) Answering paragraph 3 of the complaint, defendant says it has no knowledge or information sufficient to form a belief as to the allegations therein contained. It therefore demands strict proof thereof.

"(3) It denies each and every other allegation of the complaint, and says that, if any damage came to plaintiff by reason of the fill washing out, it was caused by extraordinary floods and freshets and unprecedented rainfall, for which this defendant is in no wise responsible."

"The case came on for trial before Judge Buchanan and a jury. After testimony of the plaintiff and its witnesses, the defendant moved for a nonsuit, and this being refused, it introduced its testimony. After the charge of the judge the jury returned a verdict for plaintiff. A motion was then made for a new trial, which being refused, the defendant appealed on the following grounds:

"(1) That his honor erred in refusing the motion for a nonsuit, the error being, as it is respectfully submitted: (1) That as there was no testimony to sustain the allegations of the complaint, or to show any liability on the part of the defendant, the testimony clearly showing that the culvert and embankment in question had been constructed and built long before the defendant began to operate the railway, and there being no evidence of any demand upon the defendant to abate the alleged nuisance, and no refusal on its part so to abate, and no evidence that the defendant had in any way increased the alleged nuisance, the nonsuit ought to have been sustained. (2) Because there was no evidence showing that the culvert and embankment in question, in so far as the plaintiff was concerned, was negligently or improperly constructed.

"(2) Because his honor erred in permitting testimony as to the effects, on other and different lands above the railway, of this rainfall, and by water becoming backed on said lands by reason of the stopping of the mouth of the culvert in question; the error being, as it is respectfully submitted, that this was to allow in testimony damages done other and different lands, differently situated towards the defendant than plaintiff's land was, thereby aiding in confusing the issues in the minds of the jury, to the prejudice of the defendant, and allowing the jury to consider damages to other lands in order to estimate the damages that may have been done to plaintiff's land.

"(3) In permitting evidence in reply as to the kind of crops which grew or were raised on other lands in other years—the error being, as it is respectfully submitted: (a) That this evidence was not in reply to any evidence introduced by the de-

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fendant, thereby letting matters come before the jury unexplained and uncontroverted by the defendant. (b) That such evidence was irrelevant as well as incompetent, it not being the proper way to prove the damages done the plaintiff's land. (c) Because such evidence of damages was purely speculative.

"(4) In permitting evidence in reply as to cost of ditching the land of plaintiff by witnesses who did not testify that they knew the land before the alleged injuries; such evidence not being in reply to anything introduced by defendant, and, besides, the same being matter of opinion and speculative, and not being either relevant or competent, there being no special damages alleged.

"(5) Because his honor erred in charging as follows at the request of the plaintiff: 'A wrongful obstruction of a water course by a railroad company makes the railroad company liable to landowners for all damages resulting therefrom'—the error being, as it is respectfully submitted, that such charge failed to define what was a wrongful obstruction of a water course, and besides tended to lead the jury to conclude that the defendant company would be liable, irrespective of the question, and also overlooked the question of reasonable and ordinary care in constructing or maintaining such culvert.

"(6) Because his honor erred in charging and instructing the jury as follows: 'The question is, was the construction of the culvert facilities, taking into account the location and topography of the country, the current of the stream, and all conditions there, not whether it was constructed as such things may be usually constructed, imperfectly, but the way it was constructed by the Southern Railway Company here, and if it was constructed negligently as alleged in the complaint, and if it was constructed as a man of ordinary care and prudence would have constructed it, or if they did not construct it, then it was a nuisance created by somebody else; but if they maintained it after demand had been made upon them to remove it, or if there was no demand made upon them to remove it, did they increase it by their want of care? For the plaintiff must show that the facilities originally constructed, whether originally constructed by the defendant, or, if not created by it, it must have increased it or maintained it, after request or demand to abate it had been made'—the error being, as it is respectfully submitted: (a) That this was a charge upon the facts, and instructed the jury that culverts may usually be constructed imperfectly. (b) That this was a charge upon the facts, and overruled and instructed the jury that this culvert was constructed by the Southern Railway Company. (c) That in so charging and instructing the jury his honor erred, in that he violated section 26, art. 5, of the Constitution of 1895, which prohibits judges from charging juries in respect to matters of fact. (d) That in so charging, his honor did not declare the law, as required by the Constitution, but, on the contrary, charged the jury in respect to matters of fact, contrary to the provisions of section 26, art. 5, of the Constitution, and ex-

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pressed to them his opinion upon the evidence introduced in the case.

“(7) Because his honor erred in charging the following requests of the plaintiff, to wit: ‘It is the duty of a railroad company to keep the culverts, fills, and other property in repair, and if it fails to keep same in proper repair and damage results to contiguous landowners, the railroad company is guilty of negligence and is liable for such damages’—the error being, as it is respectfully submitted, that this was a charge upon the facts of the case, contrary to the provisions of section 26, art. 5, of the Constitution, which prohibits judges from charging juries on the facts, in that it indicated to the jury what facts would constitute negligence, and instructed them that the failure of a railroad company to keep culverts and fills in proper repair was negligence, irrespective of the question of reasonable and ordinary care. It is further respectfully submitted that this charge was erroneous, in that it overlooked the question as to whether the defendant constructed the culvert and fill in question, or whether there had been any demand or notice upon the defendant to abate the alleged nuisance before suit was brought, or whether the defendant, if the culvert and fill was constructed before it began to operate the road, had increased the same, but, on the contrary, indicated to the jury that, irrespective of these questions, the defendant would be liable in any event, if the culvert and fill were not kept in proper repair; whereas, it is respectfully submitted that, if this culvert was built and constructed before the defendant began to operate the road, then it could not be liable unless there was some demand or notice upon the defendant to abate the alleged nuisance before suit brought, or unless there was evidence that it had increased it.

“(8) Because his honor erred in not granting the motion for a new trial, there being no evidence to sustain the verdict, and in any event, the evidence being so overwhelming in favor of the defendant, it was an abuse of discretion not to have so granted said motion.”

We will now pass upon these grounds of appeal.

1. We hold that the circuit judge committed no error, as here pointed out in subdivisions 1 and 2. The testimony offered by the plaintiff tended to show that, while the culvert of the railroad was constructed by the original owner of the same, its lessee, the defendant, had, three years before the accident, built an adjunct of brick to the stone culvert erected by its predecessor, which was the first to give way in May, 1901, and in its fall blocked up the mouth of the culvert, thus causing the damming up of the waters of Foster’s Meeting House Branch; that although the defendant spent some time in the repairs of the roadbed at this point, yet it failed to remove the debris in the channel of its culvert, so that the water of the branch was dammed up three-quarters of a mile; and also that clay from its embankment was thrown into the channel of the stream, thus enabling the second rainfall to assume heavy proportions, flooding plaintiff’s land

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with mud, water, and timber, destroying plaintiff's crops thereon, and rendering his bottom land (15 or 20 acres) uncultivable. These facts being in testimony, there was no error in the circuit judge when he refused a nonsuit.

2. When the circuit judge admitted testimony as to the effects of the water being dammed up by the culvert on the land of others up the said branch, he did not err, as this was one method by which the effect of the damming of the waters of the branch was made palpable. This exception is overruled.

3. There was no objection made as to the introduction of this testimony. It was therefore not reversible error.

4. If the bottom lands of the plaintiff could have been relieved by ditching, and that would have caused a reduction of plaintiff's damages, it was competent to show that such ditching would cost a good sum of money, and also that it would have been difficult to remove the mud precipitated upon it by the breaking of the culvert. This exception is overruled.

5. It is well-settled law in this state, where a grantor has built a culvert and an embankment that any defect in either must be referred to the original owner, and where the same have been transferred by the original owner that the purchaser from such is not responsible for the defects of such culvert or embankment. The new owner or lessee must be requested or required to remove such obstructions before any liability attaches to the new owner or lessee. However, if the new owner or lessee shall change materially such culvert or embankment, and damage results therefrom, such new owner or lessee will itself become responsible. *Gentry v. Railroad Company*, 38 S. C. 284, 16 S. E. 893; *Wallace v. Railroad Company*, 37 S. C. 335, 16 S. E. 35; *Townes v. City Council*, 52 S. C. 396, 29 S. E. 851; *Privett v. Railroad Company*, 54 S. C. 98, 32 S. E. 75; *De Laney v. Railroad Company*, 58 S. C. 357, 36 S. E. 699, 79 Am. St. Rep. 843.

6. This also covers the sixth ground. It will be observed in reading the charge that the judge was exceedingly careful in laying down this law, for he said: "For, if a prior owner of the road had created it, the defendant is not responsible for it, unless it maintained it after a demand to abate it had been made. Or, if the defendant increased it, was it guilty of the wrongful and negligent act specified in the complaint? If it was not, in the absence of any request or any increase in it, it is not responsible for its condition, if maintained as originally constructed. If it just held it as the person who originally constructed it, if it held just as it was originally maintained, without any request to move it, or without any increase in it, it is not responsible." We see no charging upon the facts by the circuit judge, nor did he express his opinion. We overrule these two grounds of exception.

7. We see no objection to the charge of plaintiff's request. The judge's general charge took care of the defendant. This exception is overruled.

8. The circuit judge did not err in refusing to grant the mo-

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tion for a new trial, for there was evidence to sustain the verdict. We do not see that the evidence is overwhelming in favor of the defendant, but we have no concern in a law case with the testimony. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

CITY OF ELKHART *v.* MURRAY.

(Supreme Court of Indiana, Oct. 10, 1905.)

[75 N. E. Rep. 593.]

Constitutional Law—Class Legislation—Street Railroads—Regulation.*—A city ordinance, providing that it shall be unlawful on and after a certain date to run any street car within the city without having securely fastened to its front end a proper automatic fender made by a particular fender company, or some other fender equally as good, to be approved by the common council or its street committee, was void for nonuniformity and as arbitrarily discriminating in favor of some manufacturers of fenders and against others.

Appeal from Circuit Court, Elkhart County; Joseph D. Ferrall, Judge.

Action by the city of Elkhart against Forrest Murray. From a judgment in favor of defendant, the city appeals. Affirmed.

John M. Van Fleet, for appellant.

Perry L. Turner and *Brick & Bates*, for appellee.

MONKS, C. J. This action was brought by the city of Elkhart for the violation by appellee of an ordinance which provides that "it shall be unlawful on and after May 1, 1903, to run any street car within the limits of said city without having securely fastened to its front end, a Hunter automatic fender, made by the Hunter Automatic Fender Company, of Covington, Ky., or some other fender equally as good, to be approved by the common council or its street committee." The court below held the ordinance invalid and rendered judgment in favor of appellee.

There was no law in force in 1903, when said ordinance was passed, granting in express words to cities of the class to which appellant belonged the power to require street cars running within the city limits to be equipped with fenders. But, assuming that such power may be implied from those granted (*People v. Detroit United Railway*, [Mich.] 97 N. W. 36, 63 L. R. A. 746, 749, and cases cited), was said ordinance a reasonable exercise of that power? Such power, if possessed by the city, must be exercised by ordinance. The ordinance must contain permanent

*For the authorities in this series on the subject of the power of municipal corporations to regulate the operation of street railways and other railroads in streets, the constitutionality of ordinances, etc., see foot-notes appended to *Sluder v. St. Louis Transit Co.* (Mo.), 16 R. R. R. 293, 39 Am. & Eng. R. Cas., N. S., 293.

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legal provisions operating generally and impartially upon all within the territorial jurisdiction of such city, and no part thereof be left to the will or unregulated discretion of the common council or any officer. If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of action and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons. *City of Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180, and cases cited; *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; *Bessonies v. City of Indianapolis*, 71 Ind. 189; *City of Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12; *Mayor of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, 244; *State v. Dering*, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948, 952, 953; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 27, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155, and authorities cited; *Noel v. People*, 187 Ill. 587, 591, 592, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238; *City of Chicago v. Trotter*, 136 Ill. 430, 438, 26 N. E. 359; *State v. Tennant*, 110 N. C. 609, 612, 613, 14 S. E. 387, 28 Am. St. Rep. 715, 15 L. R. A. 423, and cases cited; *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558, and authorities cited pages 575, 576; *City of Newton v. Begler*, 143 Mass. 598, 10 N. E. 464; *State v. Mahner*, 43 La. Ann. 496, 497-498, 9 South. 480; *May v. People of Colorado*, 1 Colo. App. 157, 27 Pac. 1010.

In *Bessonies v. City of Indianapolis*, 71 Ind., at pages 197 and 198, this court said: "Without any provision as to the location or management of hospitals, the ordinance attempts to make it unlawful for any one to establish or conduct one without a license or permit from the common council and board of aldermen; and the granting or refusal of the license or permit is not governed by any prescribed rules, but rests in such case in the uncontrolled discretion of the common council and board of aldermen. It is apparent that under the ordinance, if valid, the common council and board of aldermen have the power to grant or refuse the license in any given case at their mere pleasure, and that no one can conduct or maintain a hospital within the city, however harmless or beneficial it might be, except by the consent of the common council and board of aldermen. It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them to grant or refuse the license as they might think for the public good. It is sufficient to say that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license and refuse another under the same circumstances. No

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law could be valid which by its terms would authorize the passage of such an ordinance. The twenty-third section of the Bill of Rights provides that 'the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' What the Legislature cannot do directly in this respect, it cannot authorize a municipal corporation to do." In *City of Richmond v. Dudley*, 129 Ind. 116, 117, 28 N. E. 314, 13 L. R. A. 587, 28 Am. St. Rep. 180, this court said: "It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of an opportunity for the exercise, of an arbitrary discrimination by the municipal authorities between citizens who will so comply."

It will be observed that said ordinance requires the use of the particular fender described therein, or some other fender equally as good, to be approved by the common council or street committee. The ordinance, if valid, vests in the common council and street committee an arbitrary discretion, which they may exercise or not at their pleasure. They have the power to approve a fender for use by one street railroad company, and refuse approval of the same fender for use by another company, under the same circumstances and conditions. They also have the power to approve one or more fenders, and refuse approval of other fenders equally as good or better, whether made by the street railroad company or some one else, thus arbitrarily discriminating in favor of some manufacturers and against others. It is the fact that said officers have the power to do this, and not that they will do so, that renders said ordinance invalid.

Judgment affirmed.

LAROE v. NORTHAMPTON ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Hampshire, Oct. 17, 1905.)

[75 N. E. Rep. 255.]

Municipal Corporations—Streets—Change of Grade—Damages to Abutting Owners.—Where the grade of a street is altered by the grant of a location of a street railway, it is not altered "for the purpose of repairing such way," within Rev. Laws, c. 51, § 15, providing that an abutter shall be entitled to compensation for damages sustained by the raising or lowering of a public way, or for the purpose of repairing such way.

Street Railroads—Location—Change of Grade—Injuries to Abutting Owners.—Rev. Laws, c. 112, § 44, making a street railway liable for injuries sustained during construction resulting from the carelessness of defendant's servants, if notice is given and an action

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begun as provided by chapter 51, § 20, has no application to injuries suffered by an abutting owner by a slight raising of the grade of the surface of a street by the railroad company in the process of construction.

Same.*—Where a street railway company was granted a location along a street, it was not liable for a slight raising of the grade from 6 to 15 inches, reasonably necessary as a matter of proper construction.

Case Reported from Superior Court, Hampshire County; Lemuel Le B. Holmes, Judge.

Action by one Laroe against the Northampton Street Railway Company to recover damages for a change of the grade of a street on which plaintiff was an abutting owner by defendant railway company in the construction of its line thereon. A verdict was directed for defendant, and the case was reported to the Supreme Judicial Court. Judgment on verdict.

Edwd. L. Shaw and John L. Lyman, for plaintiff.

John C. Hammond and Henry P. Field, for defendant.

LORING, J. This is an action of tort, brought by an abutter on a public way against a street railway for building an embankment on the way, some 6 to 15 inches in height, in the construction of their tracks. The damage was caused by turning surface water onto the plaintiff's land, and otherwise. The plaintiff offered to show "that no grade was fixed in the location granted

*For the authorities in this series on the question what are, and are not, elements of the damages recoverable by abutting owners, arising from the operation or construction of street railway or commercial railroads in streets, see foot-notes appended to *Hester v. Durham Traction Co. (N. Car.)*, 15 R. R. R. 830, 38 Am. & Eng. R. Cas., N. S., 830; foot-notes appended to *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 15 R. R. R. 122, 38 Am. & Eng. R. Cas., N. S., 122; foot-note appended to *Harrington v. Iowa Cent. Ry. Co. (Iowa)*, 15 R. R. R. 97, 38 Am. & Eng. R. Cas., N. S., 97; foot-note appended to *Smith v. Southern Pac. R. Co. (Cal.)*, 14 R. R. R. 457, 37 Am. & Eng. R. Cas., N. S., 457; extensive note appended to *Louisville & N. Terminal Co. v. Lellyett (Tenn.)*, 15 R. R. R. 498, 38 Am. & Eng. R. Cas., N. S., 498.

For the authorities in this series on the question whether abutting owners are entitled to compensation for injuries to their property from the construction or operation of street railways or commercial railroads in streets, see extensive note appended to *Louisville & N. Terminal Co. v. Lellyett (Tenn.)*, 15 R. R. R. 498, 38 Am. & Eng. R. Cas., N. S., 498; foot-notes appended to *Vincent Bros. v. New York, etc., R. Co. (Conn.)*, 15 R. R. R. 587, 38 Am. & Eng. R. Cas., N. S., 587; foot-note appended to *Camden Interstate Ry. Co. v. Smiley (Ky.)*, 15 R. R. R. 94, 38 Am. & Eng. R. Cas., N. S., 94; foot-note appended to *Little Rock, etc., R. Co. v. Newman (Ark.)*, 14 R. R. R. 448, 37 Am. & Eng. R. Cas., N. S., 448.

For the authorities in this series on the question whether a street railway is an additional servitude, see foot-notes appended to *Hester v. Durham Traction Co. (N. Car.)*, 15 R. R. R. 830, 38 Am. & Eng. R. Cas., N. S., 830; foot-notes appended to *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 15 R. R. R. 122, 38 Am. & Eng. R. Cas., N. S., 122; *Budd v. Camden Horse R. Co. (N. J.)*, 15 R. R. R. 116, 38 Am. & Eng. R. Cas., N. S., 116.

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to the street railway company; that no grade was defined by the selectmen in the order of location or subsequent thereto; that such changing of grade in the process of construction was not made by an order or direction of the selectmen or superintendent of streets; that no authority for raising the embankment and raising the grade above the natural surface of the street had been given the street railway company, the location not having been given any grade lines, and the same not having been furnished before construction." The plaintiff conceded "that the defendant had a location to construct a street railway under the statutes," and "that in the building of the embankment and the construction of the road the work was properly done as street railway construction." The plaintiff owned the fee in that part of the way on which the embankment in question was constructed. Upon these facts a verdict was directed for the defendant, and the case is here on report.

In *Callender v. Marsh*, 1 Pick. 418, it was decided that no action can be maintained by an abutter for raising or lowering the grade of a highway by one authorized so to do. In the Revised Statutes it was provided that an abutter should have compensation when he sustained damage by the raising or lowering of a public way, or other act done "for the purpose of repairing such way." Rev. St. c. 25, § 6, now Rev. Laws, c. 51, § 15. Where the grade of a public way is altered by the grant of a location of a street railway, it is not altered "for the purpose of repairing such way" (Rev. St. c. 25, § 2, now Rev. Laws, c. 51, § 15), and for that reason no compensation is due under that act. That was decided in *Underwood v. Worcester*, 177 Mass. 173, 58 N. E. 589. See, also, *Vigeant v. Marlborough*, 175 Mass. 459, 56 N. E. 708. In such a case, however, the grade of the public way is rightly altered under the authority given to grant locations to street railways. That was decided in *Purinton v. Somerset*, 174 Mass. 556, 55 N. E. 461. The result is that where the grade of a public way is altered in the location of a street railway, the abutter is without remedy. The statute passed to cover the injustice of *Callender v. Marsh*, 1 Pick. 418, does not cover this case, and it remains subject to that decision.

As to what was said in *Hewett v. Canton*, 182 Mass. 220, 224, 65 N. E. 42, that, if the abutter in such a case has a remedy against the street railway, it is under St. 1898, c. 578, § 11, now Rev. Laws, c. 112, § 44, referring to the clause in effect making a street railway liable (*inter alia*) for loss or injury sustained during construction which results from the carelessness of its servants, if notice is given and an action begun, as provided in Rev. Laws, c. 51, § 20; that is to say, as provided for actions brought to recover for defects in public ways. That section manifestly was enacted to relieve towns from liability for injuries to travelers in fact caused by the railway, and has no application in cases like that now before us. These propositions are not seriously questioned, if questioned at all, by the plaintiff. His contention is that under this location the grade of the way

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here in question was not rightly altered, and for that reason he, as owner of the fee on which the embankment was constructed, can sue in tort for the wrongful construction of it on his land. He argues that, under a location which is silent as to the grade, the railway must be built at the grade in fact existing or lawfully established. We are of opinion, however, that this contention is not correct, but that, on the contrary, as matter of construction of the location here in question, the grade of the way might be changed within the limits here in question, if that was reasonably necessary as matter of street railway construction, and further, the plaintiff's concession, that "in the building of the embankment and the construction of the road the work was properly done as street railway construction," must be taken to mean that. The case, therefore, falls within *Purinton v. Somerset*, 174 Mass. 556, 55 N. E. 461, and *Callender v. Marsh*, 1 Pick. 418; and the entry must be:

Judgment on the verdict.

WILDER v. AURORA, DE K. & R. ELECTRIC TRACTION CO.

(Supreme Court of Illinois, June 23, 1905.)

[75 N. E. Rep. 194.]

Dedication—Streets—Defective Plat.—Rev. St. 1845, c. 25, § 17, provides that whenever any person wishes to lay out a town, or an addition or subdivision of outlots, he shall cause the same to be surveyed and a plat or map thereof made by the county surveyor, and that it shall be acknowledged by the owner. Held, that where a plat was certified by a deputy county surveyor instead of the county surveyor, and was not certified to have been laid out by the owner, but merely by his agent, the plat was invalid as a statutory dedication of streets shown thereon.

Same—Sales under Plat—Effect.—Where a plat of a city addition was insufficient to create a statutory dedication of the fee in the streets shown thereon, the title remained in the dedicator until he sold lots by reference to the plat, when the title to the soil in front of the lots to the center of the street passed to the grantees.

Adverse Possession—Evidence.—Where plaintiff acquired title to a lot in question by warranty deed, and occupied the same as his homestead thereunder as color of title for 17 years, and paid all taxes assessed thereon for 15 years, he had title to the land by limitations.

Deed—Description—Sufficiency.—Where a deed recited that it was made on a certain date between G., of the city of Chicago, county of Cook, and state of Illinois, of the first part, and H., of West Aurora, in the county of Kane and state of Illinois, of the second part, and described a parcel of land lying in sections 21 and 22 of townships 38 north, of range 8 east, of the third principal meridian, and known as "Gale's Addition to West Aurora," it was not objectionable for failure of the description to state the state or county in which the premises conveyed lay.

Same—Property Conveyed.—Where a deed conveyed the whole of a city addition, except lot 8 in block 10 and lot 12 in block 13, it conveyed lot 9 in block 19 of such addition.

Same—Erasures.—Where a second deed was executed in the place of a quitclaim, and a warranty deed form was used for the purpose,

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the mere erasure of such words as were necessary in order to make the deed correspond with the original quitclaim deed was immaterial.

Appeal—Freehold Involved.—Where an original bill averred that complainant was the owner in fee of a certain city lot, and that such ownership extended to the center of W. street in front of such premises, subject only to the use of the public as a public highway, and defendant denied that complainant was the owner in fee of any part of W. street described in the bill, but averred that the fee in such street was in the city, a freehold was directly involved in the litigation, warranting a direct appeal to the supreme court.

Same—Constitutional Question.—Where a bill to restrain defendant's construction of a railway in a street in front of complainant's premises alleged that complainant was the owner of the fee to the center of the street, and that defendants were about to construct a commercial railroad without affording complainants compensation and in violation of complainant's constitutional rights, the bill presented a constitutional question, warranting a direct appeal to the supreme court.

Street Railroads—Franchise to Individuals.—Under Sess. Laws, 1899, p. 331, providing that any company which has been or shall be incorporated under the general laws of the state to construct, maintain, or operate any street railroad may enter on and appropriate any property necessary for the construction and operation of its road, and City & Village Act, art. 5, § 63, par. 90 (1 Starr & C. Ann. St. 1896 [2d Ed.] p. 712), providing that the city council shall have no power to grant the use of or right to lay down any railroad tracks in any street of the city to any railroad company, whether incorporated under general or special law of the state, except on petition of property owners, etc., an ordinance granting a street railway franchise to individuals was void.

Same—Ordinance—Amendment.—Where, after the passage of a void ordinance granting a street railway franchise to individuals, the city council passed another ordinance amending the former ordinance, but complete in itself, granting to a certain corporation, its successors and assigns, a franchise to use the streets for a certain electric railroad, such latter ordinance was not invalid because passed as an amendment to a void act.

Same—Petition to Council—Assignment.—Where a petition by property owners for the passage of an ordinance granting a street railway franchise as required by City & Village Act, art. 5, § 63, par. 90 (1 Starr & C. Ann. St. 1896 [2d Ed.] p. 712), was for the grant to certain individuals, their representatives and assigns, and not to defendant corporation, and an ordinance granting such franchise to such individuals was void, an assignment of their rights thereunder to a subsequent corporation did not operate as an assignment of the petition, so as to entitle the city council to pass another ordinance thereunder granting a new franchise to the corporation.

Injunction—Construction of Street Railroad—Pleading.—Where, in a suit to restrain the construction of a railroad in a street in front of plaintiff's property, the bill alleged that there was on file in the city clerk's office a petition from abutting owners filed prior to the enactment of the first franchise by the city council to four named persons, a copy of which was attached to the bill, and that no other or different petition of voters had been filed with the council authorizing the enactment of an amending franchise ordinance, the fact that the latter ordinance recited that it had been petitioned for by the owners of the land representing more than one-half of the frontage of each and every mile of streets sought to be used by the traction company, etc., did not justify a conclusion on demurrer to the bill that the amendatory ordinance had been petitioned for.

Street Railroads—Petition—Franchise.—Where a petition of abutting owners for the grant of a street railroad franchise prayed that such grant should be for a term of 40 years from the passage of the

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ordinance, an ordinance, granting authority to a traction company for a term of 38 years from the passage thereof did not conform to the petition.

Same—Commercial Railroad—Use of Streets—Eminent Domain.*—

Where an electric street railway company was organized under the railroad law, as distinguished from the street railroad act, and by the terms of its charter was authorized to operate through several counties and transport passengers, their ordinary baggage, United States mail, express, and milk, it was a commercial railroad, and was not entitled to lay its tracks in a street, the fee of which was in the abutting owners, without condemning a right to do so.

Appeal from Circuit Court, Kane County; Chas. A. Bishop, Judge.

Bill by George Wilder and others against the Aurora, De Kalb & Rockford Electric Traction Company. From a decree dismissing the bill, complainant George Wilder appeals. Reversed.

Rehearing denied October 12, 1905.

The original bill in this case was filed on October 11, 1904, by the appellant, George Wilder, and two others, to wit, C. H. Hitchcock and E. W. Dunton, alleging that they were residents of Aurora, in Kane county, and owners of real and personal property in said city, and taxpayers, and that said Wilder was the owner in fee of lot 9 in block 19 in Stephen E. Gale's Addition to West Aurora; that Hitchcock was the owner in fee of lot 3 in block 18 in said addition, and that E. W. Dunton was the owner in fee of lot 7 in block 20 in said addition; and that their respective fees began in the center of Walnut street in said city, and that they respectively owned the fee of Walnut street in front of their premises, subject only to the use of the same by the public as a public highway, and had valuable improvements on their respective premises. The original bill was filed against V. A. Watkins, William George, R. S. Vivian, William P. Kopf, C.

*See *Mordhurst v. Ft. Wayne & S. W. Traction Co. (Ind.)*, 15 R. R. R. 122, 38 Am. & Eng. R. Cas., N. S., 122 (the carriage of light express matter, passengers, baggage, and mail matter upon street cars does not constitute a ground of complaint on the part of abutting owners); *Diebold v. Kentucky Traction Co. (Ky.)*, 10 R. R. R. 201, 33 Am. & Eng. R. Cas., N. S., 201 (interurban electric railway authorized to carry freight and passengers as a trunk railway, under Kentucky constitution); *Rische v. Texas Transp. Co. (Tex.)*, 1 R. R. R. 484, 24 Am. & Eng. R. Cas., N. S., 484 (right of abutter to damages where street railway is operated for transportation of freight); *Fidelity Loan & Trust Co. v. Douglas (Iowa)*, 9 Am. & Eng. R. Cas., N. S., 713 (street railway, though authorized to carry freight, baggage, and express matter, is not a commercial railway); *Montgomery v. Santa Ana & W. R. Co. (Cal.)*, 1 Am. & Eng. R. Cas., N. S., 44 (whether carrying freight by street railway is an additional servitude).

As to whether a street railway is an additional servitude entitling an abutter to compensation, see generally, foot-note appended to *Hester v. Durham Traction Co. (N. Car.)*, 15 R. R. R. 830, 38 Am. & Eng. R. Cas., N. S., 830; foot-note appended to *Mordhurst v. Ft. Wayne & S. Traction Co. (Ind.)*, 15 R. R. R. 122, 38 Am. & Eng. R. Cas., N. S., 122; *Budd v. Camden Horse R. Co. (N. J.)*, 15 R. R. R. 116, 38 Am. & Eng. R. Cas., N. S., 116.

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W. Ross, and the Aurora, De Kalb & Rockford Electric Traction Company.

The bill alleges that on May 27, 1902, the city council of Aurora, without authority in law and contrary to the statute, granted a license to the said Watkins, George, Vivian, and Kopf, their heirs, executors, administrators, and assigns, to construct a railroad in said Walnut street, in Aurora, which would necessarily pass over the portions of their respective premises, owned in fee by the complainants, falling within Walnut street; that the said license was approved May 29, 1902, by the mayor of Aurora, a copy of said ordinance being attached to the bill; that on November 2, 1903, said city council attempted to amend said void license or ordinance, extending the time within which the grantees therein were to perform the acts therein mentioned 12 additional months, a copy of said amendatory ordinance being attached to the bill; that the electric traction company above named is organized under the general railway laws of Illinois, with such powers as are authorized by the statutes of Illinois, a copy of its articles of incorporation being attached to the original bill; that no compensation has ever been paid to complainants, or either of them, for the use of the fees owned by them respectively in said street; that they have not, or either of them, consented to the occupation or use of their fees in Walnut street for the purpose of said railroad; that said railroad has not attempted to condemn, or purchase from them, the privilege of taking from them their rights in said fees; that said pretended license or franchise was granted without authority of law; that the city did not have the power, under the statutes or Constitution of the state, to grant said license, as attempted in said ordinance and the amendment thereto, and that said Watkins, Vivian, George, and Kopf were not thereby vested under the statutes and Constitution of the state with the power to receive authority from the city of Aurora to exercise the right of eminent domain and construct a railroad in the public highway; that said license is void, and no rights were acquired by the grantees therein under the same; that said proposed railway, as set out in said ordinance, is intended to be a part of a railroad system extending from the intersection of North River and Walnut streets in Aurora the entire length of Walnut street to the westerly limits of the city, and there connecting with the tracks of the Aurora, De Kalb & Rockford Electric Traction Company, and forming a continuous railroad to the city of Rockford by way of the city of De Kalb; that said grantees propose to lease or sell, assign and transfer, their rights in said franchises to said electric traction company, and that said electric traction company will operate said railway for its entire length; that said traction company is licensed and permitted by said ordinance to carry express and milk, and that it is proposed to conduct a large business by carrying merchandise to and from Rockford and Aurora, and the cities lying between them along said line, whereby it is proposed to subject the

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fees of complainants to an additional servitude not authorized by law, and without due compensation to them for the confiscation of their property for said purpose; that complainants attach to their bill, and make a part thereof, a true copy of the plat of said Stephen F. Gale's Addition, and of the certificate of acknowledgment of said plat; that said individuals and traction company threaten to enter upon Walnut street, and make excavations and tear up the surface thereof, with a view to constructing thereon and maintaining railroad tracks and operating a railroad, and in so doing will not only discommode public travel, but will interfere with the right of ingress and egress of complainants to and from their respective premises, to their irreparable injury. The bill prays that said Watkins, George, Vivian, Kopf, Ross, and said electric traction company may be required to answer the bill, and that it may be decreed that the said license or franchise is void and a nullity, and that the said defendants and their assigns obtained no rights under it, and that they may be enjoined from exercising any of the pretended rights granted thereby, and from going upon Walnut street for the purpose of excavating or tearing up the same, or building or constructing said railroad, and from going upon the respective fees of the said complainants upon said street for said purpose, etc.

The defendant Ross filed a disclaimer. The defendants, Watkins, George, Vivian, and Kopf filed a joint and several answer on November 23, 1904. On the same day the separate answer of the Aurora, De Kalb & Rockford Electric Traction Company was filed to the original bill. Replications were filed to the answers.

On November 27, 1904, the cause came on for hearing upon bill and answers, and evidence was offered by complainants to show that they were owners of lots abutting on Walnut street, and that these lots extended to the center line of the street. Oral evidence was also introduced by the defendants tending to show the character of their road and railway, and the character of the business proposed to be transacted by the latter.

On December 6, 1904, the bill was dismissed by the complainants as to C. H. Hitchcock and E. W. Dunton, and on the same day the bill was dismissed as to the defendants Watkins, George, Vivian, Kopf, and Ross, leaving the Aurora, De Kalb & Rockford Electric Traction Company the only party defendant. On the same day, leave was given to the complainant Wilder, being the only complainant left, to file a supplemental and amended bill, which supplemental bill was filed on December 17, 1904, and on December 19, 1904, a demurrer was filed to the amended and supplemental bill.

On December 22, 1904, the court rendered a final decree, wherein, after reciting that the cause came on to be heard upon said original bill and the answers thereto, and upon the amended and supplemental bill and the demurrer of the traction company thereto, and upon proofs oral and documentary heard in open court upon said original bill and the answers thereto, and after

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reciting that the court found the equities of the cause to be with the defendant and against the complainant, it was decreed that the demurrer to the amended and supplemental bill be sustained, and that the original and amended and supplemental bills be dismissed for want of equity. To the ruling of the court in sustaining the demurrer and in dismissing the original and amended and supplemental bills, the complainant excepted, and took an appeal to this court. The present appeal is prosecuted for the purpose of reviewing the decree of dismissal so entered on December 22, 1904.

By the terms of the original ordinance passed by the city council of Aurora on May 27, 1902, and approved May 29, 1902, authority was given, by the first section thereof, to said Watkins, George, Vivian, and Kopf, "their heirs, executors, administrators and assigns," to lay down, maintain, and operate a railway, with the necessary curves, side tracks, turn-outs, cross-overs, switches, and Y's, in and upon certain streets in Aurora, to wit, North River street and Walnut street. By section 1 it was provided that no tracks other than the single track of "said grantee" should be permitted upon Walnut street, except that one side track or switch, not to exceed 200 feet in length, might be located on Walnut street at some point between Lake street and May street. By said section 1 a double-track railway was to be constructed upon North River street extending southerly between the north line of Walnut street to Galena street, and a single track railway upon Walnut street extending from the east line of North River street to the westerly limits of the city, together with the right to connect the tracks thereby authorized at such points as might be deemed necessary by said Watkins, George, Vivian, and Kopf, their heirs, executors, administrators, assigns, or lessees, and the further right to connect said tracks with the tracks of any railway company operating tracks in Aurora, but only for the purpose of forming the loop therein referred to, the tracks to be laid and in operation within 30 months after the passage of the ordinance, with the exception of such time as the work might be delayed by injunction or the action of the council; the rights thereby granted only to be forfeited as to the unbuilt portion of the tracks in case of noncompletion within the time specified. Said grantees and their assigns were granted the right to permit any railway company, subject to the approval of the city council, to use their tracks on North River street from Walnut street to Galena street for the purpose of such loop as should be at any time operated through the business portions of the east and west sides of the city.

Section 2 of the ordinance provided that the grant therein should extend for the term of 40 years from the passage of the ordinance, provided the same should be accepted by said parties within 10 days after the passage thereof, and provided further that the local rate of fare which the grantees or their assigns might charge for a continuous ride over its tracks in Aurora should be readjusted in the following manner: For the first 20

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years the local rate of fare should not be more than 5 cents. For the following 20 years the local rate of fare should be determined by ascertaining the lowest rate of fare, demanded by street railways, prevailing in 10 different cities having approximately the same population as Aurora, etc.

Section 3 of the ordinance provided that said grantees, their legal representatives or assigns, should use, in the construction of the tracks, improved girder rails on North River street, and T rails (not less than 70 pounds per yard, and subject to the approval of the city council) on Walnut street, which should be so laid that vehicles may freely and safely cross the same.

Section 4 of the ordinance provided that, during November, December, January, February, and March of each year, heating apparatus of a certain kind should be provided, and that the cars upon said tracks should be run at such intervals as might be necessary to accommodate the public, provided that said cars should be run at intervals of not more than one hour apart between 5 o'clock a. m. and 9 o'clock p. m., and that said cars should be run at a speed not to exceed 5 miles an hour on curves, and 10 miles an hour on the balance of the local line of said railway, subject to the police regulations of the city; that, in removing snow from the tracks, said grantees, their legal representatives or assigns, should distribute it so that it would not impede public travel on the streets occupied by their tracks; that, when the city council should so order, they should, within 90 days after notice by the city clerk, place fenders on their cars.

Section 5 provided that said grantees or assigns should have the right to operate their cars by electricity, compressed air, cable, or other motive power except steam, and to construct, lay down, and erect wires, iron poles, underground conduits, and other apparatus necessary for the operation and maintenance of its lines, and to change from one motive power to another as it might elect; that, in case of the use of electric power, they should have the right to string necessary wires, including an overhead contact system, consisting of wires suspended from painted iron poles on River street and Walnut street from River street to the Geneva Branch of the Chicago, Burlington & Quincy Railroad tracks, and painted cedar poles from thence to the westerly city limits, set within the curb line of the street on either side thereof, but that said grantees in locating their poles should not obstruct driveways nor interfere with catch-basins, drains, sewers, gas or water pipes, the wires to be not less than 19 feet above the rails, and the grantees or assigns to have the right to make all necessary connections of said wires with powerhouse, car shed, or other property of grantees. By section 5 it was also provided that, in the event of any new and better method of furnishing electricity or other motive power for the operation of railways being discovered, the grantees or assigns should have the right to adopt the same in place of or in connection with the overhead trolley system. Said section 5 also

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provides as follows: "The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, United States mail, express, milk, and the cars and carriages for that purpose shall be of the style and class ordinarily used on such railways in other cities. No freight shall be carried by said grantees, their legal representatives or assigns, excepting such as is used in the construction of their road within the limits of the city of Aurora."

Section 6 provides that the grantees or assigns shall keep the space between the rails of its tracks, and two feet on the outside of each rail, on streets occupied by them, in good condition and repair, etc. Section 7 provides the grantees or assigns "shall have the right to do such excavating and grading as they may deem necessary for the proper laying of their tracks, also the right to lay drainage tile or pipe and construct catch-basins and connect said tile or pipe and catch-basins with the sewer system of the city of Aurora, but said work shall be completed within six months from the time it is commenced."

Section 7 also provides that the streets shall be left in as good condition as before the building of the road, etc.

Section 8 provides that the grantees or assigns shall save the city harmless against all damages, etc., by reason of the granting of such privileges, or resulting from the exercise of the same, and shall within 10 days from the passage of the ordinance execute a bond to the city in the sum of \$10,000 to indemnify the city against such damages, etc.

Section 9 provides that the terms and conditions of the ordinance shall inure to the benefit of the grantees, their legal representatives or assigns, and the city of Aurora, its successor or successors.

Section 10 provides that the permission and authority therein granted are to be used "for the public purpose of a general railway, connected with the tracks when laid of the Aurora, De Kalb & Rockford Electric Traction Company, a corporation organized and existing under the general railway laws of the state of Illinois, their successors, assigns, or lessees, and now projecting a railway from the city of Aurora to the city of Rockford, in said state. The rights and privileges herein granted shall cease and determine and this ordinance and the grants herein contained shall be null and void, unless the grantee herein shall construct and operate its railway from the city of Aurora, Illinois, to the city of De Kalb, Illinois, within thirty months, and unless the said grantee herein shall expend within eighteen months from the passage of this ordinance, upon the purchase of right of way and construction of its railway, the sum of at least \$20,000.00, outside of the city of Aurora, Illinois."

Section 11 provides that in consideration of the privileges granted, etc., said Watkins, George, Vivian, and Kopf, their heirs, executors, administrators, and assigns, shall, in their written acceptance of the ordinance, bind themselves, their heirs, etc., to pay or cause to be paid to the city of Aurora the sum of

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\$10,000 on or before December 15, 1902, said sum to be paid to the city treasurer on or before December 15, 1902.

Section 12 provides that the ordinance shall take effect when the grantees, their legal representatives or assigns, shall file the bond required, and accept in writing the terms and conditions of the ordinance, etc.

On November 2, 1903, there was passed, and on November 5, 1903, approved, an amendatory ordinance providing that the times within which, under the rights, privileges, and franchises given to said four individuals on May 27, 1902, they had to construct and operate their railway from Aurora to De Kalb, and within which to expend for the purchase of right of way and construction the sum of at least \$20,000, and within which to have their road constructed and in operation along said streets, should be extended 12 additional months. Section 2 of the amendatory act provided that the ordinance should be in full force and effect 10 days after its legal publication, and upon the acceptance of the same in writing within 30 days from the passage thereof by the grantees, their legal representatives or assigns.

It is conceded that no tracks had been actually laid on Walnut street, the street upon which the appellant's lot abuts, at the time of the filing of the original bill in this cause.

On November 7, 1904, the city council of Aurora passed another ordinance, which was approved on the same day, which is substantially the same as the ordinance, attacked as void in the original bill passed on May 27, 1902, and amended on November 2, 1903, except that the authority to construct the railroad in question was, by the ordinance of November 7, 1904, conferred upon the Aurora, De Kalb & Rockford Traction Company, its successors and assigns, instead of being conferred upon Watkins, George, Vivian, and Kopf, the individuals named in the ordinance of May 27, 1902; and except that the grant by the ordinance of November 7, 1904, was to extend, by the terms of section 2 thereof, for the term of 38 years from the passage thereof, instead of the term of 40 years as specified in section 2 of the original ordinance; and except that the said traction company was to construct and operate its railway from Aurora to De Kalb on or before November 27, 1905, and to expend on or before November 27, 1904, upon the purchase of right of way and construction, the sum of at least \$20,000 outside of the city of Aurora. There may be other slight differences between the two ordinances, but those already indicated are the material ones.

The ordinance of May 27, 1902, was made an exhibit to the original bill, and also to the amended and supplemental bill, and the ordinance of November 7, 1904, was made an exhibit to the amended and supplemental bill. There was also made an exhibit to the amended and supplemental bill the petition to the mayor and aldermen of the city of Aurora, and the names of the property owners signed to the same, and the amounts of feet

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frontage for which they signed, which was not signed by the complainants in the original bill, or the sole complainant in the amended and supplemental bill, being the appellant here. By the terms of this petition the owners, signing the same, owning land abutting and having a frontage on Walnut street lying between the east line of North River street and the westerly limits of Aurora, petitioned the common council of Aurora to grant to Watkins and George of Aurora, and Vivian and Kopf of Chicago, their representatives and assigns, the right to use said portion of Walnut street, or as much thereof as the mayor and aldermen may deem best, for the purpose of constructing, maintaining, and operating thereon a railroad with electricity or other motive power "which will not scatter smoke or fire, with single track with the necessary side tracks and switches and with all necessary poles (said poles to be set within the curb line of said street), wires, and other appliances for the operation of the said railroad, and we hereby consent to the construction and operation of the said railroad on, over, through and along said portion of said street or any part or portion thereof, by the said V. A. Watkins, William George, R. S. Vivian and William P. Kopf, their representatives and assigns."

There was also made an exhibit to the amended and supplemental bill an assignment, dated September 26, 1904, by Watkins, George, Vivian, and Kopf, of said franchise to the Aurora, De Kalb & Rockford Electric Traction Company, and an acceptance in writing of the assignment by the said traction company on the same day, by the terms of which assignment Watkins, George, Vivian, and Kopf, for the consideration of the sum of \$1.00 to them in hand paid by said electric traction company, sold, assigned, conveyed, set over, and transferred to said traction company, its successors and assigns, "all the title, interest, privileges and immunities granted to us, either jointly or severally, by a certain franchise hereinafter described, it being the purpose of this instrument to convey and assign to said traction company all rights by us owned or claimed, either jointly or severally, in and to said franchise, or permit, to-wit: That certain franchise heretofore granted to the undersigned, their heirs, executors, administrators and assigns, by the city council of the city of Aurora, Kane county, Illinois, known and entitled, 'Ordinance granting to V. A. Watkins, William George, R. S. Vivian and William P. Kopf, their heirs, executors, administrators or assigns, consent and right to use, locate, lay down, construct, maintain and operate a railway in certain streets and avenues in the city of Aurora, Illinois,' which said ordinance was passed May 27, 1902, approved May 29, 1902, and also the amendment to said franchise, passed November 2, 1903, and approved November 5, 1903."

There was also attached to said amended and supplemental bill as an exhibit the articles of incorporation of the Aurora, De Kalb & Rockford Electric Traction Company, in which are set forth: First, the name of the corporation; second, the places

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from and to which it is intended to construct the said railroad, as follows: In and from the city of Aurora in Kane county, thence in a northwesterly direction, through the counties of Kane, De Kalb, Ogle, and Winnebago, to and terminating in the city of Rockford, in the county of Winnebago, all in the state of Illinois, with branches or auxiliary lines of road necessary or convenient to the operation of said railroad; third, that the principal business office of the corporation should be established and maintained at Aurora; fourth, that the time of the commencement of the said proposed corporation was from the date of the filing said articles for record, as required by law, and to continue for a period of 50 years thereafter; fifth, in amount of capital stock of the corporation was fixed at \$100,000; sixth, the names and places of residence of several persons forming the corporation (then follow the names of five persons, all residing in Chicago, Ill.); seventh, the names of the first board of directors, which are the same as those last above referred to; eighth, a provision that the government of the corporation shall be vested in a board of directors and the officers, as provided by the by-laws; and, ninth, that the capital stock shall be divided into 1,000 shares of the par value of \$100 a share.

There was also attached as an exhibit to the amended and supplemental bill a written acceptance by the Aurora, De Kalb & Rockford Electric Traction Company of the ordinance passed on November 7, 1904. There was also attached as an exhibit to said amended and supplemental bill a receipt dated December 15, 1902, executed by the city of Aurora through its city treasurer, and approved by the mayor and attested by the city clerk, for the sum of \$10,000 from said electric traction company in satisfaction of the liability to the city against Watkins, George, Vivian, Kopf, and their assigns, under section 11 of said ordinance of May 27, 1902.

Carnes, Dunton & Faissler, and Cheney & Evans, for appellant.
Knight & Brown, Theodore Worcester, and George G. King, for appellee.

MAGRUDER, J. (after stating the facts). "Where the fee of the street is in the city, such damages as the abutting owner may suffer from the laying of a railroad track in the street are merely consequential, so far, at least, as they affect the property abutting on the street. In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking, the remedy being an action at law for damages." *Stetson v. Chicago & Evanston Railroad Co.*, 75 Ill. 74; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *Chicago, Burlington & Quincy Railroad Co. v. West Chicago Street Railroad Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; *Doane v. Lake Street Elevated Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265. The present proceeding is instituted by the appellant, a property owner owning a lot abutting upon Walnut street in the city of Aurora, for the purpose of enjoining the appellee, the Aurora, De Kalb & Rockford Electric Traction

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Company, from laying down its railway tracks upon Walnut street in front of appellant's property. The appellant claims that he is the owner in fee of Walnut street in front of his lot to the center of the street, subject to a right of easement over the same in the city and the public. If this is not true, and if the fee of such portion of Walnut street is in the city, and not in appellant, as above stated, then, of course, the present bill for injunction will not lie.

First. The first question, therefore, to be determined, and which is discussed by counsel, is whether or not the appellant is the owner of the fee of the street in front of his lot to the center thereof. The traction company, the appellee herein, contends that the appellant has not shown himself to be the owner of the fee to the center of the street. Appellant's property is lot 9 in block 19 in Stephen F. Gale's Addition to West Aurora. The plat of the addition was introduced in evidence, and is referred to as an exhibit to the amended and supplemental bill. The certificate attached to the plat is dated April 29, 1851, and is made by "John L. Hanchett, Deputy Surveyor," who certifies that he has surveyed and laid out into blocks, streets, alleys, and lots the following piece or parcel of land, to wit: "A part of the north-east quarter of section 21, and northwest quarter of section 22, township 38, north, range 8 east, third principal meridian." The act of 1845 providing for the acknowledgment of plats was in force when the plat here in controversy was acknowledged, and that act remained in force until the revision of the statutes of 1874. *Gould v. Howe*, 131 Ill. 490, 23 N. E. 602. Section 17 of chapter 25 of the revision of 1845 of the Statutes of Illinois provides that, whenever any person wishes to lay out a town in this state, or an addition or subdivision of outlots, he shall cause the same to be surveyed, and a plat or map thereof made by the county surveyor, etc. Rev. St. 1845, p. 115. Under the Revised Statutes of 1845, the county surveyor's certificate to the plat of an addition to a town is a requisite part of such plat when it is acknowledged by the proprietor. "The plat is neither entitled to acknowledgment or record until it has first been certified by the surveyor. His certificate must also be recorded and form a part of the record. Then, and not until then, does it become evidence of title. * * * The plat or map operates as a conveyance in fee of streets and alleys to the corporation only by force of the statute, and when it requires that it shall be 'made out, certified, acknowledged and recorded, as required by this division,' to have the effect of a conveyance, it is not within the province of a court to say it shall become a muniment of title, notwithstanding a plain requirement has been ignored." *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212. A deputy county surveyor acting in his own name, and not that of his principal, in making a survey and plat of a town addition under the statute of 1845, does not bind the principal, or make his act that of the county surveyor. *Village of Auburn*

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v. Goodwin, supra. It also appears that the other certificate indorsed upon the plat or map of the addition, certifying that such map or plat was laid out and subdivided, was not made by the owner, Stephen F. Gale, but was made by one P. A. Hall, agent for Stephen F. Gale. In *Thompson v. Maloney*, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 133, we held that a plat executed and acknowledged by an attorney in fact does not constitute a statutory dedication of the streets to the municipality. Inasmuch, therefore, as the plat of Gale's Addition to West Aurora was certified by a deputy county surveyor, and not by the county surveyor, and inasmuch as the map or plat was not certified to have been laid out by the owner, but merely by an agent of the owner, the plat was not executed in accordance with the provisions of the statute, and cannot be considered a statutory plat. Consequently the fee of the street did not vest in the city of Aurora. The title thereto remained in the owner, Gale, so long as none of the lots were sold, but, inasmuch as he sold lots by reference to the plat, title to the soil in front of said lots to the center of the street attached to the lots conveyed.

It follows, therefore, that the dedication of the streets comprised in the subdivision or addition under consideration, one of which streets was Walnut street, was a mere common-law dedication, and not a statutory dedication. If, then, the appellant has connected his title to the lot claimed by him with the title of the original dedicator of this addition, he owns the fee to Walnut street in front of his lot as far as the center of the street. "A conveyance of property abutting upon a street, shown upon a plat not sufficient to constitute a statutory dedication, carries with it the fee of the soil to the center of the street, although the property is conveyed by lot or block number only, unless the title to the street is expressly reserved to the grantor or excluded from the grant." *Brewster v. Cahill*, 199 Ill. 309, 65 N. E. 233.

We do not understand, however, that counsel for appellee seriously contend that there was anything more here than a common-law dedication only of the land embraced within the street, or that the title in fee of the abutting lot owners does not extend to the center of the street, but their claim is that the appellant has not properly connected himself with the title of the original dedicator or maker of the subdivision or addition. The record shows that, by warranty deed dated June 25, 1887, James C. Hanna and his wife, of Aurora, in consideration of \$2,750, conveyed and warranted to George Wilder, of the same place, the present appellant, lot 9 in block 19, Gale's Addition to West Aurora, Kane county, Ill., as per plat of the same on record in the recorder's office of Kane county. The proof further shows that the appellant resided upon the lot in question as his homestead for 17 years, and paid all taxes for 15 years, from 1888 to 1903 inclusive, upon said lot, such possession and payment of taxes being under the deed of June 25, 1887. Such possession and payment of taxes for more than seven years under the last-named deed, as color of title, make him the owner of said lot 9

under the limitation law in regard to possession and payment of taxes. Whether, however, such title could extend his ownership to the center of the street, it is unnecessary to inquire, and we do not decide. The abstracts of title and deeds introduced in evidence show a connected chain of title from the government down to Hanna, the immediate grantor of appellant. No objection is made by counsel for appellee, as we understand their argument, to any part of this chain of title, except one deed, to wit, a warranty deed, dated January 26, 1853, executed by Stephen F. Gale, the owner of the property when the subdivision was made, to Philip A. Hall. The description contained in this deed is as follows: "All the following described piece or parcel of land lying and being in sections No. 21 and 22 in township No. 38 north of range No. 8 east of the third principal meridian, and known as Gale's Addition to West Aurora, reserving and excepting lot No. 8 in block No. 10 and lot No. 12 in block No. 13."

The first objection made to the last above-named deed is that the description does not state in what state or county the premises conveyed lie. The deed begins as follows: "This indenture, made this 26th day of January, A. D. 1853, between Stephen F. Gale of the city of Chicago, county of Cook and State of Illinois, of the first part, and Philip A. Hall of West Aurora in the county of Kane and State of Illinois of the second part." In thus describing the residence of the grantee, Philip A. Hall, the deed describes him as being "of West Aurora in the county of Kane and State of Illinois." When, therefore, in the description of the property, mention is made of "Gale's Addition to West Aurora," a reference back to the previous part of the deed shows that West Aurora is in Kane county, Ill. This is sufficient to indicate the county and state in which the premises lay. It was so held in *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, and cases there cited. See, also, *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753; also *Billings v. Kankakee Coal Co.*, 67 Ill. 489. It is not a correct statement that no evidence was offered tending to show that the parcel of land claimed to be owned by the appellant was identical with any part of the premises described in the original deed. The deed from Gale to Hall conveys the whole of the addition to West Aurora, except lot 8 in block 10, and lot 12 in block 13. It therefore conveyed lot 9 in block 19 in said addition. The record of the plat was an exhibit to the amended and supplemental bill, and the original plat itself was produced, and appellant testified that he owned and lived and paid taxes on that particular lot of land. This was sufficient evidence to show that the premises conveyed by the deed were the same premises as those included in the recorded plat of Gale's Addition to West Aurora.

It is also insisted by the appellee that there were certain erasures in the deed from Gale to Hall, and that, although the admission of the deed was objected to upon this ground, the erasures appearing on the face of the deed were not explained.

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Two deeds were introduced in evidence, shown upon the abstract of title, and also introduced as separate instruments outside of the abstract of title. The first deed introduced was a quitclaim deed executed by Gale to Hall, dated January 26, 1853, signed by Gale, and sealed and delivered by him in the presence of one John T. Waite. This deed was recorded on January 29, 1853. On account of certain defects in the first deed, it was redrawn and re-executed by being signed and acknowledged by Gale before a notary public on September 4, 1863, and recorded on September 3, 1864. The erasures objected to are in the second deed, acknowledged in 1863, and were merely erasures of such words as made the deed correspond with the original quitclaim deed. The form used in drawing the second deed was the form of a warranty deed, and such words as operated to make it a warranty deed were erased, so as to make it conform with the original deed, which was a quitclaim deed. The comparison of the two deeds was an explanation of the erasures, so as to relieve the deed of the charge that it contained such erasures or interlineations as amounted to suspicious circumstances. *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; *Merritt v. Boyden & Son*, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246.

The deed from Gale to Hall passed the title to the property in question, and was therefore properly admitted by the court. For the reasons above stated, we are of the opinion that the appellant showed himself to be the owner in fee of said lot 9, and of the fee of so much of Walnut street lying in front thereof as extends to the center of the street. In other words, he has shown himself to be the owner in fee of so much of the half of Walnut street as lies in front of his lot.

Second. A motion was heretofore made by the appellee to dismiss the present appeal for want of jurisdiction in this court, and this motion was, by a previous order entered herein, reserved to the hearing of the cause, and will now be disposed of. The original bill averred that George Wilder, the appellant, was the owner in fee of said lot 9, and that such ownership extended to the center of Walnut street in front of said premises, subject only to the use of the public as a public highway. The defendants in their answers denied that the complainants in the original bill, or any of them, were the owners of the fee of that part of Walnut street described in the bill, but, on the contrary, averred that the fee of said street, as described in the bill, was in the city of Aurora. Hence the issue was directly made as to the ownership in fee of the property by the complainants in the original bill, and, this being so, a freehold is directly involved, and the cause was properly brought to this court. It is said, however, by counsel for the appellee, that such allegation as contained in the amended and supplemental bill was admitted to be true by the demurrer thereto, and that therefore there was no issue upon that subject which authorized the taking of the appeal to this court. The

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theory of the amended and supplemental bill was, not only that appellant was the owner in fee to the center of the street in front of his lot, but that the railroad to be constructed upon the street by appellee was a commercial railroad—that is to say, a railroad carrying both passengers and freight—and that therefore the construction of it was the imposition of a new or additional servitude in the street, for which the appellant, as the owner of the fee, was entitled to compensation. The bill avers not only that appellant was the owner in fee as above stated, but that no compensation had ever been paid to him for the use of the fee owned by him in said street, and that he had never consented to the occupation and use of said fee for the purposes of said traction company, and that said traction company had never attempted to condemn or purchase from him his rights in the fee in said street, “and that the taking of your orator’s land in said street for said purposes will be in violation of the constitutional rights of your orator.” These and other allegations in the amended and supplemental bill amount substantially to the charge that the appellee was seeking to take the property of appellant without making just compensation therefor, in violation of the Constitution of the state. For these reasons, also, the case has been properly brought to this court, as well upon the issues made by the demurrer to the amended and supplemental bill, as upon the issues made under the answers to the original bill. Accordingly, the motion to dismiss the appeal is overruled.

Third. It is claimed on the part of appellant that the ordinance of May 27, 1902, was absolutely void, as authorizing certain individuals, rather than a corporation, to construct and maintain and operate a railroad in a public street of the city of Aurora. It cannot be denied that the ordinance of May 27, 1902, was and is absolutely void upon this ground, whether the railroad be regarded as a street railroad, or as a commercial railroad. The act of March 7, 1899, in regard to street railroads, provides “that any company, which has been or shall be incorporated under the general laws of this state for the purpose of constructing, maintaining or operating any horse, dummy or street railroad or tramway, may enter upon and appropriate any property necessary for the construction, maintenance and operation of its road,” etc. Sess. Laws 1899, p. 331. The power here granted is to an incorporated company, and not to an individual. Paragraph 90 of section 63 of article 5 of the city and village act provides that “the city council * * * shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the state now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes; and when the street or part thereof sought to be used shall be more than one mile in extent no petition of land owners shall be valid, un-

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less the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile, and of the fraction of a mile, if any, in excess of the whole mile measuring from the initial point, named in such petition, of such street or of the part thereof sought to be used for such railroad purposes." 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 712. Paragraph 90, it will thus be observed, provides for a grant to an incorporated company, and not to an individual or individuals.

In *Goddard v. Chicago & Northwestern Railway Co.*, 202 Ill. 362, 66 N. E. 1066, a construction was given to the act of March 7, 1899, in reference to this question, and it was there held that the act by its terms only authorized the grant of street railroad privileges to companies incorporated under the general laws of Illinois, and not to individuals or partnerships, and that the act should not be extended by construction to apply to individuals, since that would give to individuals the sovereign power of eminent domain, and could not be adopted unless both the letter and the spirit of the act clearly so required. In that case it was said (page 368, 202 Ill. and page 1067, 66 N. E.): "The question is not whether a natural person, if the law so provided, might acquire a right of way, exercise the right of eminent domain, and enjoy the franchise to operate a street railway, but whether the law does so provide, and, if it is clear that it does not, the complainants acquired no right by the action of the county board. The Legislature had power to limit the authority of the county board to grant a license to incorporated companies created under the general laws of the state for the purpose of constructing and operating street railways, and it is not material what reason existed for prescribing the limit. It was a case for the exercise of the legislative judgment, with which we are not concerned.

* * * The right to operate a street railway and collect fares for carrying passengers, and the power to exercise the right of eminent domain, are franchises. No private person can establish a toll bridge, public ferry, or railroad, or enjoy the franchise connected therewith, without authority from the Legislature, either directly granted, or by the exercise of legislative power through delegation to a municipality. 2 Smith's Law of Mun. Corp. § 1702. A franchise is a special privilege, conferred by grant from the sovereign power, not belonging to the citizen of common right. It must be derived from the laws of the state and emanate from the sovereign power, and it cannot be exercised by an individual on his own lands without the consent of the state." The same reasoning applies to paragraph 90 as above quoted. The grant there contemplated can only be to a company, and not to an individual. *McGann v. People*, 194 Ill. 526, 62 N. E. 941; *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448.

In line with the Illinois authorities is the case of *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181, where it is said: "Appellant's counsel needlessly argue at length for the natural right of individuals to receive such a franchise. That is not questioned, but only whether the Legislature has empowered a municipality

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to grant it to them. As there is no pretense that defendants, or any of them, are within such class of individuals to whom franchise is so authorized to be granted, we may, for the purposes of this case, consider the statute as if it in terms only authorized grants to street railway corporations, except, indeed, as the express mention of certain individuals the more clearly negatives grant to any others. That an authorization to grant such franchises only to corporations excludes any power to confer one on individuals, and renders void any attempt so to do, has been often decided by other courts."

In the case at bar, the ordinance of May 27, 1902, granted the right to lay down, maintain, and operate a railway on Walnut street in front of the appellant's property to V. A. Watkins and William George, of Aurora, and R. S. Vivian and William P. Kopf, of Chicago. The grant was to four individuals, and not to any incorporated company, and hence, under the authorities already cited, the grant was absolutely void.

After the original bill in this case was filed on October 11, 1904, and on November 7, 1904, a new ordinance was passed, amending the ordinance passed on May 27, 1902, and by the terms of the latter ordinance the authority to construct and operate the road was conferred upon the appellee, the Aurora, De Kalb & Rockford Electric Traction Company, its successors and assigns. Subsequently, on December 17, 1904, the amended and supplemental bill herein was filed, which refers to the passage of the latter ordinance, and makes it an exhibit to said bill. It is claimed by the appellant that the ordinance of November 7, 1904, is merely amendatory of the ordinance of May 27, 1902, and that a void ordinance cannot be amended. And such is the law. *McQuillin on Mun. Ordinances*, § 196; *People v. Onahan*, 170 Ill. 449, 48 N. E. 1003; *Tedrick v. Wells*, 152 Ill. 214, 38 N. E. 625; *Schwartz v. City of Oshkosh*, 55 Wis. 490, 13 N. W. 450. On the other hand, it is claimed by the appellee that the ordinance of November 7, 1904, is an original and independent ordinance conferring an original and independent privilege upon the appellee, and is not in any sense dependent for its validity upon the ordinance of May 27, 1902. This court has held that an act which possesses all the attributes of a complete statute in itself is not invalid because passed as an amendment to an act which had become inoperative. *People v. Onahan*, *supra*; *School Directors v. School Directors*, 73 Ill. 249; *Timm v. Harrison*, 109 Ill. 593. We are inclined to the opinion that the ordinance of November 7, 1904, may be regarded as an independent ordinance, and as possessing all of the attributes of a complete statute in itself. Its title contains the following words: "Granting the Aurora, De Kalb and Rockford Electric Traction Company, its successors, lessees and assigns, consent and the right to use, locate, lay down, construct, maintain and operate its railway as hereinafter provided, in, upon and along sundry streets and avenues in the city of Aurora, Illinois; also in said streets, the right to erect, use and maintain poles and overhead wires, and to

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build, construct and maintain underground conduits and tubes, with all necessary appurtenances, for the purpose of propelling its cars thereon by electricity or any other motive power, except steam." The body of the act confers upon the Aurora, De Kalb & Rockford Electric Traction Company the same rights as were conferred upon the four individuals named in the ordinance of May 27, 1902.

Fourth. But it is insisted by the appellant that the ordinance of November 7, 1904, was ineffectual in any event, because it was enacted without any petition from consenting property owners. There was a petition to the mayor and aldermen of the city of Aurora by the owners of land abutting and having a frontage on Walnut street, etc., asking for a grant to Watkins, George, Vivian, and Kopf, their representatives and assigns, of the right to use the street for the purpose of constructing, maintaining, and operating thereon a railroad, etc. This petition was for a grant to the four individuals, and not to the appellee corporation. The property owners signing the consent consented to an ordinance conferring the power to construct and operate the road upon certain individuals, but there is nothing to show that they ever consented to the grant of power to the appellee company to construct and operate the road. Counsel for appellee say that the consent or petition was to the effect that the grant should be made to the four individuals named, "their representatives and assigns." A written assignment is then produced, and is attached as an exhibit to the amended and supplemental bill, wherein Watkins, George, Vivian, and Kopf assign, set over, and transfer to the appellee corporation "all the title, interest, privileges and immunities granted to us, either jointly or severally, by a certain franchise hereinafter described, it being the purpose of this instrument to convey and assign to said traction company all rights by us owned or claimed, either jointly or severally, in and to said franchise or permit, to-wit: That certain franchise heretofore granted to the undersigned, their heirs, executors, administrators and assigns, by the city council of the city of Aurora, * * * known and entitled, 'Ordinance granting to W. A. Watkins, William George, R. S. Vivian and William P. Kopf, their heirs, executors, administrators or assigns, consent and right to use, locate, lay down, construct, maintain and operate a railway in certain streets and avenues in the city of Aurora, Illinois,' which said ordinance was passed May 27, 1902," etc. This is not an assignment of the consent of abutting property owners. It is an assignment of the rights and privileges and franchises granted by the ordinance of May 27, 1902. As that ordinance was absolutely void because of the grant to individuals instead of a company, there could be no valid assignment of it.

Independently, however, of this consideration, the ordinance of May 27, 1902, being invalid in attempting to confer rights on the four individuals, could not be valid because it authorized such individuals to assign the franchise or privileges conferred upon them. This would amount to a delegation of power by the city

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council to the four individuals to license a railroad company to construct and operate a railroad in a street of the city. An ordinance attempting to so delegate power is void. Legislative powers conferred upon municipalities cannot be delegated. In *City of Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359, we said (page 433, 136 Ill., and page 360, 26 N. E.): "The powers that were granted by the state, and that are relied upon by the municipality, were delegated to the city council; and that body could not transfer its legislative prerogatives, and the public trust which was imposed upon it, to a mere executive officer." See, also, *People v. Village of Crotty*, 93 Ill. 180. In *City of East St Louis v. Wehrung*, 50 Ill. 28, it was held that, where the power is conferred upon municipal corporations to regulate any calling or business, it is so done with the intention that such power shall be exercised by the corporations, and in the mode prescribed, and that they are not warranted in delegating a discretionary authority to others, or to an individual. In *Hickey v. Chicago & Western Indiana Railroad Co.*, 6 Ill. App. 172, where the general railroad law conferred upon a railroad company authority to construct a railroad upon a street in a city with the assent of the corporation, it was held that, as the act contained no provision as to how such consent might be obtained, the action of the city council must be governed by the provisions of the general statute relating to the incorporation of cities and villages; and it was also there held that cities have full power to regulate the location and use of railroad tracks within their corporate limits, but that this is a public power or trust, and can be exercised by the corporation when and in such manner as it shall judge best, but that such power cannot be delegated to others. It may be here observed that, in the case at bar, the act of March 7, 1899, in regard to street railroads, if it has any application here at all, provides that no such company shall have the right to locate or construct its road along any street in any incorporated city "without the consent of the corporate authorities of such city," but it is not specified how such consent may be obtained, and therefore the action of the council must be governed by the provisions of the general statute relating to the incorporation of cities and villages, which includes paragraph 90 of section 63 of article 5 as above quoted. It follows from what is said that the appellee corporation could have obtained no authority to construct and operate its railroad along Walnut street in front of appellant's property by virtue of the power to assign, given by the ordinance of May 27, 1902, to the four individuals there named, and by virtue of the assignment executed by such individuals to the appellee. The consent or petition, signed by the property owners and appearing in the record, could only apply to the action of the city council in passing the ordinance of May 27, 1902. It could not be used as a basis for the action of the city council in passing the ordinance of November 7, 1904. In order to invest the common council of Aurora with power to pass the latter ordinance, there should have been a new petition

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by the requisite number of property owners. This precise point has been recently decided by this court. In *Vennum v. Village of Milford*, 202 Ill. 423, 66 N. E. 1040, it was held that where an ordinance based upon a petition of property owners was invalid, and the confirmation proceeding was dismissed, the same petition could not be used by the improvement board as a basis for recommending another ordinance. The same principle announced in *Vennum v. Village of Milford*, *supra*, applies here.

It is true that the title of the ordinance of November 7, 1904, contains these words: "This ordinance having been duly petitioned for by the owners of land representing more than one-half of the frontage of each and every mile and fraction of a mile in excess thereof, or so much thereof as is sought to be used by said traction company, of all that portion of the streets hereinafter described." The ordinance of November 7, 1904, including its title, or the description of what the ordinance is, is an exhibit to the amended and supplemental bill, and is therefore to be regarded as a part of the bill. In *Cummings v. West Chicago Park Com'rs*, 181 Ill. 136, 54 N. E. 941, it was held that a recital in an ordinance providing for an improvement, that the petition of the owners of a majority of the land fronting on the improvement was presented to the municipal authorities, is sufficient prima facie evidence of the existence of such jurisdictional fact. See, also, *McGann v. People*, 194 Ill. 526, 62 N. E. 941. If a recital in the title to the act can be regarded the same as a recital in the body of the act, then the recital above quoted from the title of the ordinance of November 7, 1904, might be regarded as prima facie evidence that the latter ordinance was duly petitioned for by the owners of land, etc., under the issue made by the demurrer to the amended and supplemental bill. But the amended and supplemental bill contains the allegation "that there is on file in the city clerk's office of said city of Aurora a petition from abutting owners of land on said Walnut street, filed prior to the enactment of the first purported license herein mentioned to said four natural persons, a copy of which petition is hereto attached and marked 'Exhibit 3,' and made a part of this amended and supplemental bill, and no other or different petition of abutters on said Walnut street has been filed with said city council authorizing or attempting to authorize in any way the enactment of the last amendment of November 7, 1904." The demurrer to the amended and supplemental bill admits the allegation in question to be true, and it stands the same as though it were established by proof. Inasmuch as the recital in the title of the act as above quoted can only be regarded as prima facie evidence that the ordinance of November 7, 1904, was duly petitioned for, such prima facie case thereby made is overcome by the allegation that no other or different petition of abutters on Walnut street was filed with the city council authorizing the enactment of the ordinance of November 7, 1904, except the petition or consent already referred to, which preceded the ordinance of May 27, 1902, and upon which the latter was based. The allegation that

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no other or different petition of abutters was filed than the one already referred to is not the statement of a mere conclusion, but is the statement of a fact. Counsel refer to the case of *Schuchert v. Wabash, Chester & Western Railroad Co.*, 10 Ill. App. 397, as sustaining the contention that the allegation is merely that of a conclusion, but in the case in question the bill averred "that there was no such petition as the statute requires." This was the statement of the conclusion of the pleader that the petition did not conform to the requirement of the statute. But in the case at bar the allegation is of the fact that no other petition was filed with the common council than that set forth as preceding the ordinance of May 27, 1902. It is said that the statute does not require that the petition should be filed with the common council, but merely that the council should have no power to make the grant in question "except upon the petition of the owners," etc. It is said that the petition might be presented to the common council in some other form than by filing it, and that it need only be exhibited or otherwise brought to the knowledge of the council. The bill alleges, however, and the demurrer admits it to be true, that the petition of abutting property owners, upon which the ordinance of May 27, 1902, was based, was filed in the city clerk's office, and, this being so, the presumption is that, if there had been another petition as a basis for the ordinance of November 7, 1904, it also would have been filed in the city clerk's office. The bill expressly alleges that it was not so filed, and the proper way of bringing such a document to the attention of the common council would be by filing it.

Moreover, the ordinance which the property owners petitioned for not only granted the right to construct and operate the road in Walnut street to the four individuals named, but it provided in section 2 that the grant therein should extend for the term of 40 years from the passage of the ordinance of May 27, 1902; but the subsequent ordinance of November 7, 1904, in addition to granting the authority, referred to, to the traction company, provided in section 2 that the grant therein should extend for the term of 38 years from the passage thereof. Non constat that the property owners who petitioned for a grant to individuals for 40 years would have been satisfied with a grant to a corporation for 38 years.

"Without the statutory consents the street railroad company has no right to commence the construction of its road in the street as to which the consents are withheld; and any abutting property owner in that street owning to the center thereof can maintain an equitable action to restrain such construction, and need not prove special damage." *Nellis on Street Surface Railroads*, § 10.

"Where the abutting owner has title to the fee in the street, or where payment of compensation is by statute made a condition precedent, he may enjoin the construction of the road until compensation has been paid or tendered." 27 Am. & Eng. Ency. of Law (2d Ed.) p. 184, and cases in note.

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Fifth. It has been held that a street railway is not an additional servitude, even where the fee of the street is in the abutting owner. But it is otherwise where a steam railroad, or what is called or known as a "commercial railroad," is constructed in a public street. The latter is regarded as an additional servitude. It has been said that where the public have "only an easement in streets, and the fee is retained by the adjacent owner, the Legislature cannot, under the constitutional guaranty of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude." *Chicago, Burlington & Quincy Railroad Co. v. West Chicago Street Railroad Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485. The term "steam railroad" is used because the ordinary commercial railroad company, which carries both passengers and freight, is generally propelled by steam. But in the present case it is contended by counsel for appellee that the character of the motive power is not controlling in determining the question of whether the railroad to be constructed is a street railway or not, or whether its construction is or is not an additional servitude. Counsel for appellant say, "We assume this position to be in accord with the decisions of courts generally, and it follows from this that the fact that steam is not used as a motive power on this road is not of controlling importance."

The next question that arises, therefore, is as to the character of the road to be constructed by appellee. If the road so to be constructed be regarded as merely a street railroad, it cannot be regarded as an additional servitude, and the appellant is not entitled to an injunction against its construction, even though he is the owner of the abutting property and of the fee of the street in front thereof to the center of the same. Counsel for the appellee thus state the question succinctly in their brief: "The main question in this case is whether the railroad which the appellee company proposes to construct will be a commercial railroad or a street railway." If it is a commercial railroad, appellant is entitled to compensation before it can be built over that part of the street opposite his lot, which he owns in fee subject to the easement of the public.

It is to be noted that the railroad to be constructed by appellee is nowhere spoken of in its articles of incorporation, or in either of the ordinances granting power to construct it, as a "street railroad." A comparison of the provisions of its articles of incorporation with the requirements of the general railroad act will show that it conforms exactly to the latter act. Indeed, it is conceded that the appellee is a corporation organized under the general railroad law of the state, and not under the street railroad act. Lewis in his work on Eminent Domain (volume 1, § 110a), says: "Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches, and methods of operation and construction. It is probable that these

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variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes: (1) Commercial railroads, and (2) street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another or between one place and another. So far they have not been successfully operated, to any extent at least, except by steam. They are usually not constructed upon the public streets or highways, except for short distances. Street railroads embrace all such as are constructed and operated in the public streets for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street."

In *Diebold v. Kentucky Traction Co.* (Ky.) 77 S. W. 674, 63 L. R. A. 637, it was said: "It certainly can make no difference whether the cars of a railroad company are propelled by the agency of steam, or of gasoline, or of electricity, compressed air, liquified air, or any other agency which science and the inventive genius of man may in the future bring into use. Rather, the character of a railroad company is determined by the nature and extent and limits put upon its operation by law or otherwise, and by the character and object of its corporate creation as shown by its charter." By the terms of its charter the appellee here is to run, not in one city alone, but from the city of Aurora in Kane county, northwesterly through Kane, De Kalb, Ogle, and Winnebago counties, to the city of Rockford in the latter county, together with branches or auxiliary lines of road necessary or convenient to its operation. The appellee road is evidently not to be constructed for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street, but is to convey them, as commercial railroads do, from one place to another, and from one county to another. The charter of appellee provides that it shall continue for a period of 50 years. The general railroad law provides that no corporation shall be formed to continue more than 50 years in the first instance (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3226, c. 114, par. 5), while the act of March 7, 1899, in regard to street railroads, provides that the consent of the corporate authorities of a city to construct a street railroad along any street in the city may be granted "for any period not longer than twenty years." As the corporate existence of the appellee is to continue for some 38 or 40 years, it is certainly not a street railroad so far as the extent of its life as a corporation is concerned. In *Harvey v. Aurora & Geneva Railway Co.*, 174 Ill. 295, 51 N. E. 163, we said (page 307, 174 Ill., and page 167, 51 N. E.): "There is a wide and well-understood difference between a railroad organized for general traffic, and a street, horse, or dummy railroad. * * * A street railroad, as is well understood, is a road constructed on a street or highway for the purpose of conveying passengers living upon or having business

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on such street or highway, its main object being to accommodate street travel." In *Hartshorn v. Illinois Valley Traction Co.*, 210 Ill. 609, 71 N. E. 612, we said that street railways are railways on or upon streets of a city or town, and that a street railway may not, like a steam railway, locate its route in order to reduce time and distance for passengers traveling from town to town across the country, and that, as such location of its route is not for the accommodation of local travel on highways or streets, it therefore "involves a perversion of the character and objects of street railways." A railway authorized to carry freight as well as passengers becomes a commercial railroad, instead of a street railroad, and such railroad, when laid in a street, becomes an additional burden on the fee, and cannot be laid without the consent of, or compensation made to, the adjoining property owners. *Linden Land Co. v. Milwaukee Railway Co.*, 107 Wis. 511, 83 N. W. 851.

In *Schaaf v. Cleveland, M. & S. Ry. Co.*, 66 Ohio St. 229, 64 N. E. 148, it is said by the court: "Besides, this company is authorized not only to carry passengers, but also to transfer over the road 'baggage, packages, boxed and barreled freight, farm produce, express matter, and United States mail'; and, although it is required to run cars over its road at least three times each way daily, it is not limited as to the number of cars or trains for freight or passengers, or both combined, or the size or make-up of the trains. All things considered, it is reasonably certain from the facts found that the practical operation of such a road, within its capacity, must necessarily produce annoyance and inconvenience to the plaintiffs, and interfere with their property rights as abutting owners, of the same general character that result from the operation of steam railroads, and become an additional burden on the public highway, and taking of the plaintiff's property in the same sense. * * * But the appropriation for this purpose cannot be constitutionally made without making compensation to the public for the injury thereby occasioned to its easement in the highway, and also making compensation to the owner of private property taken for the use indicated."

In the case at bar, the ordinance of November 7, 1904, as well as the previous ordinance of May 27, 1902, contains the following provision: "The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, United States mail, express, milk; and the cars and carriages for that purpose shall be of the style and class ordinarily used on such railways in other cities. No freight shall be carried by said grantee, its successors or assigns, excepting such as is used in the construction of their road within the limits of the city of Aurora." Thus the road to be constructed by appellee is authorized to carry not only passengers and their ordinary baggage, and United States mail and express matter, but also milk. It cannot be said that a railway which is authorized to carry one kind of freight is not a commercial road within the meaning of the definitions above quoted. The fact

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that the road is limited to the carriage of one kind of freight does not make it any the less a commercial railroad, which is defined to be one which carries both freight and passengers. Again, the ordinance authorizes the appellee corporation to do such excavating and grading as it may deem necessary for the proper laying of its tracks, thereby failing to confine the laying of its tracks to the surface of the street. It is also authorized by the ordinance to connect its tracks with the tracks of any railway company owning or operating tracks in the city of Aurora for the purpose of forming the loop referred to in the ordinance. The ordinance also provides that the authority granted to appellee is to be used for the public purposes of a railway connecting with the interurban tracks, when laid, of the Aurora, De Kalb & Rockford Electric Traction Company.

In our opinion, the railroad to be constructed under appellee's charter, and under the ordinances authorizing it to lay its tracks in the streets of Aurora, is what is called a "commercial railroad," and is not a street railroad within the definite and fixed meaning of the latter term. Being a commercial railroad, it constitutes a new and additional servitude upon the fee of the property owner to the center of the street. Therefore, inasmuch as appellant, the owner of lot 9 abutting on Walnut street, is an owner of the fee of the street in front of his lot to the center thereof, and inasmuch as the appellee is about to construct a new and additional servitude in the street upon his property without having paid him any compensation or instituted any condemnation proceeding, he was entitled to an injunction in accordance with the prayer of his bill.

For the foregoing reasons, the decree of the circuit court was erroneous, and the same is hereby reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

EDWARD H. HARRIMAN, Winslow S. Pierce, Oregon Short Line Railroad Company, and the Equitable Trust Company of New York, Petitioners, v. NORTHERN SECURITIES COMPANY.

(Argued March 1, 2, 1905. Decided March 6, 1905.)

[25 Sup. Ct. Rep. 493.]

Certiorari—Finality of Decree below.—The lack of finality in a decree reversing an order of a circuit court granting a preliminary injunction will not prevent a review in the Supreme Court of the United States by writ of certiorari issued to a circuit court of appeals, where the record presented the whole case to that court so that it might properly have been finally disposed of in terms by its decree.

Same—Final Disposition by Direction to Lower Court.—The Supreme Court of the United States will, by its direction to the circuit court, finally dispose of a cause brought before it on writ of certiorari to a circuit court of appeals, where the record presented the whole case to that court so that it might properly have been finally dis-

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posed of by its decree, although it did nothing more than to reverse the decree of the circuit court granting a preliminary injunction.

Combination of Stockholders in Competing Interstate Railway Companies—Rescission for Illegality—Stock—Title of Consolidated Corporation—Stare Decisis—Questions Not Determined.—The question whether a corporation organized pursuant to a combination of stockholders in two competing interstate railway companies to acquire a controlling interest in their capital stock holds the same as absolute owner, or as trustee or bailee, was not determined by a decree adjudging the combination to be illegal, enjoining the new corporation from acquiring any further stock, from voting such stock as it then held or might subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings, and restraining the railway companies from permitting or suffering any such action on the part of the new corporation, and from paying any dividends on account of the stock held by it, and providing that nothing therein shall be construed as prohibiting the new corporation from returning the railway shares to the original stockholders, or to the holders and owners of its own stock issued in exchange for these shares.

Stare Decisis.—General expressions in an opinion which are not essential to the disposition of the case cannot control the judgment in subsequent suits.

Combination of Stockholders in Competing Interstate Railway Companies—Stock Exchanged for Other Stock—Sufficiency of Evidence to Establish Trust or Bailment.—A clear preponderance of proof is essential to establish that the parties to a transaction by which a corporation, formed for the purpose, acquired, in exchange for its own capital stock, a controlling interest in the capital stock of two competing interstate railway companies, pursuant to a combination of the stockholders in those companies, agreed that the new corporation should hold such stock as trustee or bailee for the railway stockholders, where the transaction on its face was one of purchase and sale.

Same—Same—Recovery—In Pari Delicto.—The rule that property delivered under an illegal contract cannot be recovered back by parties in pari delicto prevents the original stockholders in two competing interstate railway companies from reclaiming the specific shares of stock which they delivered to a stockholding corporation in exchange for its capital stock, pursuant to a combination subsequently adjudged illegal, under which the corporation was to acquire a controlling interest in the capital stock of each of such railway companies; and they must be content with the ratable distribution of the corporate assets resolved upon by the stockholding corporation.

Same—Rescission for Illegality—Recovery of Stock Exchanged—In Pari Delicto—Laches and Acquiescence.—Laches and acquiescence would themselves defeat any right of the original stockholders in two competing interstate railway companies to rescind the contract under which they had delivered their stock to a corporation formed in pursuance of a combination under which such corporation was to acquire a controlling interest in the capital stock of the railway companies in exchange for its own capital stock, where such stockholders stood upon their rights as shareholders in the new corporation until nearly a year after the Supreme Court of the United States had adjudged the combination to be illegal, and until the directors of the new corporation resolved upon a ratable distribution of its corporate assets, during which time stock in the new corporation had passed into many hands.

Violation of Anti-Trust Law—In Pari Delicto—Good Faith.—Parties to a transaction adjudged to violate the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), are not exempt from the doctrine in pari delicto on the theory that they

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acted in good faith and without intent to violate the law, where, with knowledge of the facts and of the statute, they acted under the mistaken supposition that the statute would not be held applicable to the facts.

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed an order of the Circuit Court for the district of New York enjoining the Northern Securities Company from making the ratable distribution of its corporate assets resolved upon by its directors. Affirmed, and the cause remanded to the Circuit Court with directions to dismiss the bill.

See same case below, 134 Fed. 331.

Statement by MR. CHIEF JUSTICE FULLER:

Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company, and the Equitable Trust Company of New York exhibited their bill against the Northern Securities Company in the circuit court of the United States for the district of New Jersey April 20, 1904, on which, with accompanying affidavits and exhibits, a restraining order was issued, pending an application for an injunction as prayed in the bill. April 26 an amended bill was filed, and the application for a preliminary injunction was heard May 20, 21, and 23 by Bradford, J., holding the circuit court.

On the 4th day of June a second amended bill was filed, and on July 15, 1904, Judge Bradford delivered an opinion sustaining the application. 132 Fed. 464.

The order for injunction was entered August 18, 1904, and an appeal therefrom was prosecuted to the circuit court of appeals for the third circuit, which, on January 3, 1905, reversed the order. 134 Fed. 331.

Thereupon complainants applied to this court for the writ of certiorari, which was granted January 30, and the matter advanced for hearing, and heard March 1 and 2. The affirmance of the decree of the circuit court of appeals was announced March 6, it being added that an opinion would be filed afterwards.

The Northern Pacific Railway Company was the successor, through reorganization, of the Northern Pacific Railroad Company, and by its charter it was provided that its capital stock might be increased from time to time by a vote of a majority of the stockholders, and that the company might, by a like vote, classify its stock into common and preferred, and might "make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors." On July 1, 1896, by the unanimous vote of its then stockholders, the capital stock was increased to \$155,000,000 divided into \$80,000,000 of common stock and \$75,000,000 of preferred stock, and it was resolved "that such preferred stock shall be issued upon the condition that, at its option, the company may retire the same, in whole or in part, at par, from time to time, on any

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1st day of January prior to 1917." The plan of reorganization which was adopted provided that, as to the new company, which it was contemplated should acquire the properties and franchises of the Northern Pacific Railroad Company, and the issue of preferred stock by it, "the right will be reserved by the new company to retire this stock, in whole or in part, at par, from time to time, upon any 1st day of January during the next twenty years."

All the certificates of stock, whether common or preferred, at that time or subsequently issued, contained this clause: "The company shall have the right, at its option, and in such manner as it shall determine, to retire the preferred stock, in whole or in part, at par, from time to time, upon any 1st day of January prior to 1917."

The reorganization had been managed by J. P. Morgan & Company, and the directory of the Northern Pacific Railway Company were friendly to that firm. During the same period the president of the Great Northern Railway Company was James J. Hill, and its directors were friendly to him.

The two companies were friendly to each other, and in April, 1901, acquired the shares of the Chicago, Burlington & Quincy Railroad Company.

At this time the Union Pacific Railway system included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company, and the railroad of the Oregon Railroad and Navigation Company. The Union Pacific Company was practically the owner of the entire capital stock of the Oregon Short Line Railroad Company, and the latter company was the owner of practically the entire capital stock of the Oregon Railway & Navigation Company. The interests in control of the Union Pacific system might properly be called the Harriman interests. Shortly thereafter, at the instance of the Union Pacific Railway Company and with money furnished by that company, the Oregon Short Line company purchased Northern Pacific preferred stock to the amount of \$41,085,000, and common stock to the amount of \$37,023,000, aggregating \$78,100,000 of stock, being a majority of the \$155,000,000, total capital stock of the Northern Pacific company as then outstanding. But the preferred stock was subject to retirement at par at the option of the company, and the 370,230 shares of common stock was less than a majority of the total common stock, which majority was held by the Morgan-Hill party.

In October, 1901, complainant Harriman was elected a member of the board of directors of the Northern Pacific Railway Company and James Stillman was re-elected. They were also directors of the Union Pacific Railway Company. The both attended a meeting of the Northern Pacific board on November 13, 1901, and Harriman was chosen a member of the executive committee. At this meeting resolutions were adopted providing for and resulting in the retirement of the preferred stock on January 1, 1902, by the payment of \$100 cash for each and every share to each and every holder of record on that day.

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These resolutions declared that the company thereby determined to exercise its right to retire the preferred stock; provided that, for the purpose of raising funds necessary to do so, the company should issue its negotiable bonds for \$75,000,000, convertible at par into shares of the common stock of the company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder, and arranged for the retirement from and after December 31, 1901, of the \$75,000,000 preferred stock, by the payment to each and every holder of record thereof on January 1, 1902, of \$100 cash for each and every share.

On November 15, the executive committee of the Northern Pacific company authorized the execution of a contract with the Standard Trust Company of New York for the sale and delivery of the convertible certificates for \$75,000,000 provided for in the resolutions.

The preferred stock was subsequently taken up in accordance with the plan resolved upon.

The Northern Securities Company was incorporated under the laws of New Jersey in November, 1901, its articles of association having been filed at Trenton on the 13th day of that month, with a capital stock of \$400,000,000, divided into 4,000,000 shares of the par value of \$100 each, and its objects being certified to be:

“(1) To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association, or associations, of the state of New Jersey, or of any other state, territory, or country.

“(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory, or country, and, while owner thereof, to exercise all the rights, powers, and privileges of ownership.

“(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, shares of the capital stock of any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory, or country; and, while owner of such stock, to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

“(4) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or

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things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

“(5) To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business.

“The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

“The corporation shall have power to conduct its business in other states and in foreign countries, and to have one or more offices out of this state and to hold, purchase, mortgage, and convey real and personal property out of this state.”

On the 14th day of November, 1901, fifteen gentlemen, including complainant Harriman and two other directors of the Union Pacific, James J. Hill, president of the Great Northern, and two members of J. P. Morgan & Company, were elected directors of the Northern Securities Company. Complainant Harriman took his seat at the board, and an executive committee of five was elected, of which he was one.

November 15 resolutions were passed authorizing the purchase of the Northern Pacific stock held by Harriman and Pierce, as follows:

“The president stated that he now had an opportunity of acquiring \$37,023,000 par value of the common stock, and \$41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of \$91,407,500, payable, as to \$82,491,871, in the fully paid-up and nonassessable shares of this company at par, and, as to the remaining \$8,915,629, in cash.

“On motion, and by affirmative vote of all the directors present, it was—

“Resolved, That the president be, and hereby he is, authorized, in behalf of this company, to purchase said stock—namely, \$37,023,000 par value of the common stock, and \$41,085,000 par value of the preferred stock of the Northern Pacific Railway Company—at an aggregate price of \$91,407,500, payable, as to \$82,491,871 thereof, in the fully paid-up and non-assessable shares of the capital stock of this company at par, and, as to \$8,915,629, in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of \$82,491,871, and to pay \$8,915,629 in cash, in consideration of such \$37,023,000 of the common stock and \$41,085,000 of the preferred stock of the Northern Pacific Railway Company.

“Resolved, That the president be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902.

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at the rate of 4 per cent. per annum on the sum receivable for such preferred stock.

"Resolved, That the president be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the board of directors of the Northern Pacific Railway Company, passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"Resolved, That the president be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"Resolved, That the president be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, and to do all acts and things, which he may deem needful in the premises."

Complainant Harriman and his codirectors of the Union Pacific were not present at this meeting, but were present at the next meeting of the board on November 19, at which the minutes of the meeting of November 15 were read and on motion were approved.

At a subsequent meeting of the executive committee, in which Mr. Harriman participated, the form of the company's permanent stock certificate, being the usual form, was unanimously approved.

In the meantime, and on November 18, Harriman and Pierce had delivered their Northern Pacific stock to the Northern Securities Company, and that company had delivered to them the 824,000 shares of its stock and \$8,915,629 in cash.

The Northern Pacific stock certificates received from Harriman and Pierce were surrendered by the Securities company to the Northern Pacific Railway Company. The certificates for the 370,230 shares of common stock were exchanged for 370,230 shares of common stock issued in the name of the Northern Securities Company. The certificates for the 410,580 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement, and paid for and retired as provided, the transaction resulting in the receipt by the Northern Securities Company of certificates for 347,090 shares of new common stock. This made 717,320 shares, and the Securities company also required 820,270 shares, from a large number of separate individual owners. And from a large number of stockholders of the Great Northern 1,181,242 shares of the stock of the latter company.

At a meeting of the board of directors of the Northern Securities Company on January 22, 1903, at which complainant

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Harriman was present, the sale by the company of 75,000 shares of its own stock for cash was approved. The second amended bill says \$7,522,000 "was issued for cash used for the purchase of other property, and for corporate purposes."

From the organization of the Securities company until the affirmance of the decree in the government suit, hereafter mentioned, complainants continued to exercise the right of holders of 824,000 shares of stock in the Securities company; received after share of dividends, and gave their proxy to vote at the annual meetings of 1902 and 1903.

July 17, 1902, Harriman and Pierce and the Oregon Short Line Company pledged the 824,000 shares of Northern Securities Company stock to the Equitable Trust Company, the Short Line Company executing a trust indenture, which contained this clause: "The deposit and pledge hereunder of said shares of stock, or of any other securities which shall become subject to this indenture, shall not prevent the consolidation, union, or merger with any other corporation of the Securities company, or of any other corporation by which said securities shall have been issued, or the sale of its property or the distribution of its assets. In any such case the trustee shall receive such amounts of stock, bonds, or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities company, or other pledged securities, as the case may be, shall be entitled to receive, and, upon receipt thereof, shall surrender the deposited stock certificates or other securities."

March 10, 1902, a bill was exhibited in the circuit court of the United States for the district of Minnesota by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, to restrain the violation of the act of Congress of July 2, 1890, 26 Stat. at L. 209, chap. 647 (U. S. Comp. Stat. 1902, p. 3200), entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," which resulted April 9, 1903, in a decision in favor of complainants (120 Fed. 721), and a decree as follows:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several states, such as an act of Congress, approved July 2, 1890, entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring,

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or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising, or attempting to exercise, any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The case was brought to this court, and March 14, 1904, the decree was affirmed. 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. Rep. 436.

March 22, 1904, the board of directors of the Northern Securities Company adopted the following preamble and resolutions:

"Whereas, in the course of its business, this company has acquired, and now holds, 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, in a suit brought by the United States against this company, the said railway companies, and others, this company

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has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company; and

“Whereas, this company has issued, and there are now outstanding, 3,954,000 shares of its own capital stock; and

“Whereas, this company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay:

“Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railroad companies held by it.

“Resolved, That the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

“Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars (\$3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars (\$3,954,000), divided into thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars (\$100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

“Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents (\$39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents (\$30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

“The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

“Resolved, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon

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such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and state of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice was accordingly given that the meeting of the stockholders would be held on April 21, and a copy of the resolutions and an explanatory letter were sent to the Attorney General of the United States. Early in April the three principal complainants in the present suit presented to the circuit court for the district of Minnesota their petition for leave to intervene in the suit of the United States against the Northern Securities Company, setting up substantially the same grounds as in this suit, and seeking similar relief. This application was heard at St. Paul April 12 and 13. The government appeared by the Attorney General, and filed a declaration that it was satisfied with the relief granted. April 19, 1904, the court rendered its decision, denying leave to intervene. 128 Fed. 808.

Up to April 18, 1904, the Securities Company had issued 86,945 certificates of stock and there had been 16,000 transfers registered on the books of the company. At the closing of the transfer books on that day there were 3,953,971 shares of stock outstanding in the hands of 2,531 separate holders.

The meeting of the stockholders of the Northern Securities Company was duly held April 21, 1904; and at that meeting the stock of the company was reduced 99 per cent, and the proposed pro rata distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Northern Securities Company, was assented to. Two million nine hundred and forty-four thousand seven hundred and forty shares were represented, and all voted for the plan adopted by the directors.

As has been stated, the second amended bill was filed after the hearing on the application for the preliminary injunction, and it was therein alleged, among other things, that the Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states; that the said company was to "acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of said holding company upon the basis of \$180 par value of its stock for each share of Great Northern stock and \$115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns.

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"That prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company had acquired and at the time of the incorporation and organization of said Securities company owned, \$37,023,000 par value of the common stock and \$41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after the incorporation of the said Northern Securities Company had been resolved upon as aforesaid, your orators Harriman, Pierce, and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of \$78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of \$82,491,871 par value and \$8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company, did, on or about the 18th day of November, 1901, transfer and deliver to said Northern Securities Company certificates for \$37,023,000 par value of the common stock and \$41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid, and received in exchange therefor certificates of said Northern Securities Company representing an interest in \$82,491,871 par value and said cash. * * *

"That at the time of such exchange, on said 18th of November, 1901, it was agreed between said Harriman and Pierce and said defendant, Northern Securities Company, that the said \$41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for \$34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce, and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid."

"Your orators are advised by counsel, and, therefore, aver,

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that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of said railway company acquired and held by it as aforesaid; that it acquired and held possession thereof in violation of said anti-trust act; that it acquired no title thereto, and cannot transfer any rights in respect thereof; and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns."

The prayer of the bill was "that it be decreed that said proposed plan of distribution is illegal and contrary to law and in violation of the rights and equities of your orators, and that the complainants are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company, delivered by them, were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators, and such sum in cash as may be just; and that the said defendant, Northern Securities Company, its directors, officers, and agents, may be ordered and directed to indorse the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator the Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by it, to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents, and employees, be perpetually enjoined and restrained from in any manner parting with, disposing of, transferring, assigning, or distributing, any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

"Your orators further pray that the defendant, Northern Securities Company, may be enjoined and restrained from parting with, disposing of, transferring, assigning, or distributing, said stock of the Northern Pacific Railway Company, or any part thereof, during the pendency of this suit, or any certificates now representing the same."

The proofs embraced the pleadings and decrees in the suit of

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United States v. Northern Securities Company; the ex parte affidavits of Harriman, Hill, and others; the deposition of Harriman taken before the Interstate Commerce Commission at Chicago in January, 1902; the deposition of Harriman taken in the suit of Minnesota v. Northern Securities Company in December, 1902; extracts from the minutes of proceedings of the board of directors of the Northern Pacific Railway Company, and of the executive committee and board of directors of the Northern Securities Company.

Messrs. *William D. Guthrie, D. T. Watson, R. S. Lovett, Maxwell Evarts, John F. Dillon, R. V. Lindabury, and Bainbridge Colby*, for petitioners.

Messrs. *Elihu Root, John G. Johnson, Francis Lynde Stetson, John W. Griggs, W. P. Clough, and Thomas Thacher*, for respondent.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

In applying to this court for the writ of certiorari counsel for complainants insisted that the circuit court of appeals had practically disposed of the entire controversy on the merits, although its decree only reversed the order of the circuit court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In our opinion the record presented the whole case to that court in such wise that it might properly have been finally disposed of in terms by its decree, in accordance with the well-settled rule upon that subject. *Mast, F. & Co. v. Stover Mfg. Co.*, 177 U. S. 495, 44 L. Ed. 860, 20 Sup. Ct. Rep. 708; *Castner v. Coffman*, 178 U. S. 183, 44 L. Ed. 1027, 20 Sup. Ct. Rep. 842; *Knoxville v. Africa*, 77 Fed. 501.

In *Western U. Teleg. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 547, ante, p. 133, 25 Sup. Ct. Rep. 133, the circuit court had granted a preliminary injunction (120 Fed. 981), which was reversed by the circuit court of appeals. 59 C. C. A. 113, 123 Fed. 33. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill. The motion was denied, and the telegraph company took an appeal to this court. Subsequently the circuit court sua sponte entered an order dismissing the bill, and the telegraph company appealed therefrom to the circuit court of appeals. 195 U. S. 547, ante, p. 133, 25 Sup. Ct. Rep. 133. We then granted a certiorari, and, considering both appeals together, affirmed the decree of dismissal.

In the present case we granted the certiorari, at the instance of complainants, before the case had gone back to the circuit court, and shall do what the circuit court of appeals might have done,—that is, finally dispose of the case by our direction to the circuit court.

Complainants deny that the Securities company became the owner of the Northern Pacific Railway shares, and assert, to the contrary, that the company held the shares as a trustee or a bailee for complainants.

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And the principal ground on which this contention is rested is that it was so adjudicated by the circuit court for the district of Minnesota in the government suit, by the decree of April 9, 1903, affirmed by this court.

It may be said in passing that complainants were not parties of record to that suit, and that they were not parties by representation, if the effect of the transfers as between the parties thereto had been in issue and the vital conflict between complainants and the corporation, now set up, then existed which would destroy the community of interest on which the rule of representation is founded. And, on the other hand, in that suit the Northern Securities Company, at a time when complainant Harriman was a director, answered that "every share of the Great Northern company and the Northern Pacific company, acquired by this defendant, has been, and so long as it remains the property of the defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders and officers, that the same shall be held, owned, or kept, by it for any period of time whatever, or under any agreement that in any manner restricts or controls to any extent any use of the same which might lawfully be exercised by any other owner of said stocks."

But we are of opinion that the circuit court did not determine the quality of the transfer as between the defendants themselves, nor was that the purpose of the government proceedings.

The decree of April 9, 1903, adjudged that defendants had theretofore entered into a combination or conspiracy in restraint of trade and commerce; that all stock of either of the railway companies then held or owned by the Securities company was acquired and held in virtue of such combination; and enjoined the Securities Company and the two railway companies from receiving, or permitting the exercise of, any control by the Securities company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities company; and the Securities company was forbidden from acquiring further stock of either of the railway companies.

And it was provided that nothing should be construed as prohibiting the Securities company from returning and transferring the railway shares to the original railway stockholders who had delivered their shares to the Securities company for shares of its stock; or to such person or persons as might be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the railway companies.

This did not involve a decision that any original vendor of the railway shares was entitled to a judicial restitution thereof, and such was the view of the circuit court itself, for in its opinion of April 19, 1904, the court said:

"The decree was wholly prohibitory. It enjoined the doing of

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certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The government was satisfied with the relief obtained; and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities company the stockholders of that company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject-matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for the stock in the two railway companies; but this provision was purely permissive. It did not command that the stock should be so returned or to exclude other methods of disposition of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested

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by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance, and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The decree of April 9, 1903, was affirmed by the judgment of this court, which, of course, went no further than the decree itself. We did, indeed, by our judgment leave the circuit court at liberty "to proceed in the execution of its decree as the circumstances may require," but this did not operate to change the decree, or import a power to do so not otherwise possessed.

Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.

This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohen v. Virginia*, 6 Wheat. 399, 5 L. Ed. 290; *Carroll v. Carroll*, 16 How. 279, 14 L. Ed. 938. But we do not think that the opinion of Mr. Justice Harlan is open to the construction put upon it. In speaking of the situation as between the government and the defendants, the Securities company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the Securities company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

Some of our number thought that, as the Securities company owned the stock, the relief sought could not be granted; but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.

Treating the question as an open one, it seems to us indisputable that, as between these parties, the transaction was one of purchase and sale. The situation is thus well put by Dallas, J.:

"The resolution which authorized the acquisition of the railway stock on behalf of the Securities company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was 'to purchase said stock * * * at an aggregate price of \$91,407,500, payable, as to \$82,491,871 thereof, in the fully paid-up and non-assessable shares of the capital stock of this company at par, and, as to \$8,915,629, in cash.' It is obvious that this resolution contemplated a 'purchase,' and not a bailment or trust; and that it accurately stated the nature and terms of the

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contract which was actually made by and with the Securities company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted * * * The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities company stock which it thereby pledged."

And the Securities company sold 75,000 shares of its stock for \$7,522,000 cash, "used," as stated in the bill, "for the purchase of other property and for corporate purposes."

But, assuming that the transaction was in form, and at least prima facie in substance, one of purchase and sale, it is denied that the equitable title vested, because, as alleged in the second amended bill, there was an agreement by the promoters of the Securities company, carried out by that company, that the latter should "acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depository, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." And here, again, we concur in the views of the circuit court of appeals as expressed by Judge Dallas.

"The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required; whereas, in our opinion it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any conditions except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that 'they further stated that, upon the organization of the proposed holding company,' not that it would take as custodian or trustee, but that 'they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company.' These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities company merely as a custodian or depository. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities company was organized has been compulsorily abandoned has not divested, or in any way affected, the

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absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made."

Complainants' counsel say, in respect of Mr. Harriman's testimony that the transaction was an unconditional purchase and sale, that he only swore to his opinion on a question of law. This will hardly do when applied to testimony as to what was said and done in conference with the alleged promoters of the Securities company. When Mr. Harriman testified that he attached to his negotiations in the sale of Northern Pacific stock no other condition than that of the price, and that the transaction was completed, how can complainants be permitted to deny that this was a statement of fact? And how can the establishment of the contract and its terms as embodied in the resolutions of November 15, 1901, approved at the succeeding meeting by the vote of Mr. Harriman, and which appeared to be, and were testified to by Mr. Hill, President of the Securities company, as constituting, the only contract which was made and authorized, be overthrown in the absence of any evidence to the contrary?

The consideration received by complainants consisted of money and Northern Securities stock certificates. Those certificates were in common form, and each was a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation. By the provisions of the corporation act of New Jersey, and its certificate of incorporation, the Securities company had power to acquire and to hold, and at any time to sell, the shares of other corporations. And under that act it had power, in the discretion of its directors and of the holders of two thirds of its capital stock, at any time, on notice, to dissolve and to wind up the corporation and distribute its assets. Complainants subjected themselves to this power in accepting the shares of the Northern Securities company, and their unqualified transfer of their railway stock was inconsistent with any obligation of the Securities company to retain the railway shares for any particular period.

In acquiring the Securities stock, complainants acquired the ordinary rights of stockholders in New Jersey business corporations, including the right to receive dividends, and to share in the distribution of the assets of the corporation on its dissolution, or of any surplus of assets on reduction of its capital stock. In view of the decree of the circuit court for the district of Minnesota in the government's suit the continued ownership of the railway shares became useless to the stockholders of the Securities company, and accordingly the directors decided to reduce the capital stock and distribute the surplus of assets created by

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that reduction, and the resolutions to that end were ratified by a vote of more than two thirds of the Securities shares.

By the transfer of the Northern Pacific shares and the payment therefor as agreed the contract was executed, and the implied obligations resulting from the relation of corporation and stockholder alone remained executory. And when the Securities company resolved to distribute these railway shares ratably among all its stockholders, it did this in performance of its contract with them, and not in repudiation of it. It is the complainants who are seeking the determination and repudiation of the contract. Their final contention in that regard is that they are entitled to a decree rescinding the contract of purchase and sale, and directing the return of the railway shares parted with by them thereunder, because of the illegality of the transaction as adjudged in the Federal courts.

And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party in *pari delicto*. "The general rule, in equity, as at law," said Mr. Justice Gray in *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 748, 12 Sup. Ct. Rep. 953, "is, In *pari delicto* potior est conditio defendentis; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453, 456; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Story Eq. Jur.* § 298. * * * When the parties are in *pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. Ed. 453, 456; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284."

That was a suit in equity by the maker of an authorized lease of a railway and franchises, against the lessee, to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for nine hundred and ninety-nine years, of which but a few years had elapsed at the date of the attempted rescission.

The illegality of the lease and the consequent breach of public duty were manifest, but the right of the lessor, therefore, to maintain the suit was denied by this court.

In the present case complainants seek the return of property delivered to the Securities company pursuant to an executed contract of sale on the ground of the illegality of that contract,

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but the record discloses no special considerations of equity, justice, or public policy, which would justify the courts in relaxing the rigor of the rule which bars a recovery.

The circuit court decrees put at rest any question that the ratable distribution resolved upon was in violation of public policy.

And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman law and the purposes of the government suit.

The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.

While the superior equities, as against complainants' present claim, of the many holders of Securities shares who purchased in reliance on the belief that they thereby acquired a ratable interest in all of the assets of the Securities company, are too plain to be ignored.

The illegal contract could not be made legal by estoppel, but the ownership of the assets, unaffected by a special interest in complainants, could be placed beyond dispute on their part by their conduct in holding the Securities company out to the world as unconditional owner.

And, without repeating in detail what has been already set out, it is plain that right of rescission of the executed contract of November 18, 1901, even if rescission could have otherwise been sustained, had been lost by acquiescence and laches at the time this bill was filed.

Since the transfer of that date Securities stock had passed into the hands of more than 2,500 holders, many of them in Great Britain, France, and other parts of Europe; nearly a year after the filing of the government bill 75,000 shares were sold for cash, complainant Harriman concurring; some months after, Harriman and Pierce and the Oregon Short Line Company pledged their 824,000 shares to the Equitable Trust Company; notwithstanding the decree of April 9, 1903, they stood upon their rights as shareholders; and it was not until after March 22, 1904, when defendant's board of directors resolved upon a ratable distribution, that complainants undertook to change an election already so pronounced as to be irrevocable in itself in view of the rights of others.

We regard the contention that complainants are exempt from the doctrine in *pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance

of the law as against the other, and defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Perhaps it should be noticed that the bill sought the return of two parcels of Northern Pacific common stock, the 370,230 shares delivered to the Securities company, November 18, 1901, and the 347,090 shares received December 27, 1901, from the Northern Pacific company on the retirement of preferred stock.

Early in 1901 the Hill-Morgan party held a majority of the common stock, and had asserted the intention to retire the preferred stock, "without," as Mr. Harriman testified, "affording the holders of the preferred stock the right to participate in any new securities that might be issued."

With full knowledge of that intention, the proceedings of the two companies followed in November, 1901, and the absolute and unconditional sale and purchase, as we hold the transaction to have been.

We find no evidence of any express agreement that complainants should be entitled to the new common stock, and it was certainly not the natural increase of the old stock, but the result of the exercise of the right of subscription. The purchase by the Securities company was on its own account, and not in trust, and cannot be disturbed because of illegal purpose at the clamor of parties in *pari delicto*. And there is here no offer of the restoration of the status quo, if that were practicable.

Doubtless it became the duty of the Securities company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter method was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results.

In fine, the title to these stocks having intentionally been passed, the former owners, or part of them, cannot reclaim the specific shares, and must be content with their ratable proportion of the corporate assets.

Decree affirmed; cause remanded to Circuit Court with a direction to dismiss the bill.

SANITARY DIST. OF CHICAGO *v.* PITTSBURGH, FT. W. & C. RY.
Co. *et al.*

(Supreme Court of Illinois, Oct. 14, 1905.)

[75 N. E. Rep. 248.]

Pleading—Allegations as to Title—Conclusiveness on Party Pleading.—In a proceeding to condemn land, the allegations of the petition as to the title of defendants are conclusive on petitioner, and defendants need not prove their title.

Eminent Domain—Petition—Requisites.—In a proceeding to condemn land, it is the duty of the petitioner to ascertain the title to the

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premises before commencing the proceeding, and to name the owner in the petition; and, if the title is less than a fee simple, it should be so stated.

Same—Issues.—While only a petition and cross-petition are contemplated by the statute authorizing condemnation proceedings, the record must show some sort of objection, issue, or traverse to justify a decision of the court as to title.

Same—Evidence as to Compensation.*—Where land sought to be condemned for public use is a portion of a freight terminal of a railway system, it has no market value, and the market value of other property is not the criterion for ascertaining the compensation which should be made.

Same.—In a proceeding to condemn land used as a freight terminal, evidence of the extent of the business transacted at the terminal station, as well as the capacity of the property for extension to meet the increasing demands of the business, is properly admitted.

Evidence—Experts—Qualification.†—In a proceeding to condemn land occupied as a railway freight terminal, witnesses who knew the value of property used as a freight terminal were qualified to testify as experts as to the value of property sought to be condemned, although they did not know the market value of property generally in the city in which the property in question was situated.

Eminent Domain—Value of Property—Evidence—Return for Taxation.—In condemnation proceedings, returns of the property for taxation, made by the lessee of the owner, were not conclusive on the question of value.

Same—Immediate Possession—Instruction.—In a proceeding to condemn land for public use, in which there is no stipulation as to when possession of the land shall be taken, it is not error to instruct the jury that, if the time taken to remove a portion of the land which it was proposed to remove would affect the amount of damages to the remainder, they should estimate the same on the basis of what should be the ordinary and natural consequences to the strip, and the damages resulting therefrom.

Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Condemnation proceedings by the Sanitary District of Chicago against the Pittsburgh, Ft. Wayne & Chicago Railway Company and others. From the judgment, petitioner appeals. Affirmed.

James Todd and Eddy, Haley & Wetten (P. C. Haley and Charles H. Pegler, of counsel), for appellant.

Wilson, Moore & McIlvaine, Herrick, Allen, Boyeson & Martin, and Loesch Bros. & Howell, for appellees.

CARTWRIGHT, C. J. Appellant filed in the circuit court of

*For the authorities in this series on the question whether where property, by reason of being applied to a particular use, has a particular value to its owner, that value is to be allowed as compensation for its condemnation, see *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 14 R. R. R. 643, 37 Am. & Eng. R. Cas., N. S., 643 (measure and elements of damages where railroad right of way is condemned for use of telegraph line); note appended to *Orleans & J. Ry. Co. v. Jefferson & L. P. Ry. Co. (La.)*, 16 Am. & Eng. R. Cas., N. S., 699.

†For the authorities in this series on the question of the admissibility of expert and opinion evidence, see foot-note appended to *Schutz v. Union Ry. Co. of New York City (N. Y.)*, 15 R. R. R. 777, 38 Am. & Eng. R. Cas., N. S., 777.

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Cook county its petition for the ascertainment of just compensation to be paid to appellees for that part of blocks 69, 70, 71, and 72, and that part of Monroe street vacated, all in school section 16, township 39, range 14, in the city of Chicago, lying easterly of a certain line beginning at a fixed point in the south line of Madison street and running thence southerly, by the way of other fixed points, to a point in the north line of Van Buren street, as described in the petition, for the purpose of deepening, widening, and improving the Chicago river between the south line of Madison street and the north line of Van Buren street; the eastern boundary of the tract being the center thread of the Chicago river. The Pittsburgh, Ft. Wayne & Chicago Railway Company and its lessees, the Pennsylvania Railroad Company and the Pennsylvania Company, filed their cross-petition, setting forth that the strip of land sought to be taken was a part of a tract of land constituting the passenger and freight station of the Pittsburgh, Ft. Wayne & Chicago Railway Company and its lessees; that said tract was improved with a station, baggage rooms, power houses, freight houses, offices, freight tracks, team tracks, and other like improvements; that it constituted the principal terminal station of the railway systems of the cross-petitioners in the city of Chicago; and that by reason of the taking of the strip to be appropriated by the petitioner the remainder of the property would be greatly damaged. It was agreed that the compensation to be paid for the lands taken and any consequent damage to the remainder should be assessed in one sum. Preliminary to the trial by jury of the amount of compensation and damage, the petitioner moved the court to ascertain and determine that the west bank of the Chicago river was upon a certain line alleged to have been established by an ordinance of the city of Chicago passed on March 16, 1857. The position of petitioner on that motion was that the legal dock line was established by that ordinance, which at some places was west of the actual dock line in the possession of the defendants and as it had existed for many years, and that the defendants should be limited to compensation to that line, except where conveyances to the railroad company limited the easterly boundary to lines west of the dock line and where the railroad company had deeded lands away. Petitioner contended that, so far as the actual dock line in the possession of the defendants was located east of the line described in the ordinance, the defendants had intruded on the bed of the river; that if the defendants caused land to be made in the river outside of the legal line they committed a wrong, and were not entitled to the possession of such made land or compensation therefor. The petitioner also contended that it should not be required to pay for the vacated end of Monroe street described in its petition, on account of certain reservations by the city, in the vacation, of a right to lay and maintain gas and water pipes and sewers therein, and because the vacated premises were to be used for the purposes of a passenger station, and were not so used, but were used for

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freight and team tracks. The court, after hearing the evidence of the respective parties, found and adjudged that the west boundary line of the river was the line of the existing dock in front of the property; that the defendants had certain rights in Adams and Jackson streets under ordinances and contracts, and had title to the vacated part of Monroe street, subject to the rights of the city of Chicago therein. To the decision of the court on these questions the petitioner excepted. A jury trial followed, resulting in a verdict finding the just compensation for the land taken and damages to the remainder to be \$1,389,940. The court overruled petitioner's motion for a new trial, and petitioner excepted and prayed for an appeal, which was allowed.

The proceeding before the court as to title was not based upon any issue in the pleadings. The petitioner described the property which it desired to appropriate, lying easterly of the line described in the petition, between Madison street on the north and Van Buren street on the south, and having its east boundary line in the center thread of the Chicago river. As a matter of fact, the easterly part from the dock line to the center of the river was submerged by the waters of a navigable stream and was already subject to the easement of navigation. The statute requires a petition setting forth a description of the property sought to be taken, with the names of the persons interested as owners or otherwise, and if the estate sought to be condemned is a limited one or subject to conditions or restrictions, either in the title or mode of use, or if it is incumbered by some public easement or right, it should be set out in the petition. The averments of the petition as to the nature or extent of the estate or title of the defendants are not binding on the defendants, and upon a proper issue the court may determine such questions; but such averments are binding on the petitioner, and the defendants are not required to establish their title. *Peoria & Rock Island Railway Co. v. Bryant*, 57 Ill. 473. If a corporation entitled to exercise the right of eminent domain claims that it already has a right to take land, a petition for condemnation is not the proper proceeding to try that question. It was the duty of the petitioner to ascertain the title to the premises before commencing the proceeding, and to name in the petition the owner of the premises, and, if the title was less than a fee simple or subject to an easement, it should have been stated in the petition. *Peoria, Pekin & Jacksonville Railroad Co. v. Laurie*, 63 Ill. 264. There was no averment on the subject in the petition, and, so far as it was concerned, the defendants were to be regarded as the owners of an unincumbered title. They were in the actual possession of the land to the existing dock line, and had been for many years, and under the petition they were not required to prove title. While only a petition and cross-petition are contemplated by the statute, the record must show some sort of objection, issue, or traverse to justify a decision by the court as to title, and in this case there was nothing of the kind. But although the proceeding was irregular, and

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not authorized by any rule of practice, the parties joined in it without objection, and offered evidence as to what part of the land was already subject to the easement of navigation and to what line the defendants were legally entitled to occupy. If it may be considered that the defendants waived their right to have the question submitted on proper pleadings, we think the conclusions of the court were correct.

The charter of the city of Chicago in force in 1857 gave the city power to widen and improve the Chicago river, and, inferentially at least, to establish dock lines, and required the council to give notice to the owner of an intention to appropriate land for widening the river. After such notice, commissioners were to be appointed to ascertain and assess the damages and compensation due the owners of land taken and to assess such damages on property benefited by the improvement. On March 16, 1857, an ordinance was passed, which was approved on March 18, 1857, establishing dock lines on each side of the Chicago river from Madison street to Van Buren street. On March 23, 1857, the city clerk was directed to advertise in the corporation newspapers that the common council intended to take and appropriate so much land as was necessary to straighten and widen said river from Madison street to Van Buren street, in accordance with a survey on file in the clerk's office. On April 3, 1857, commissioners were appointed to assess the damages for widening the river from Madison street to Van Buren street, and on April 20th two commissioners were appointed in place of two of the original commissioners. On April 27, 1857, there was a report to the council by a committee, recommending that the east line of the survey for the purposes of widening the river should be on a certain line east of said first survey, and this was concurred in by the council. On May 11th a commissioner was appointed in place of another, and on May 14th another commissioner was substituted. The ordinance establishing the dock lines could not be changed, except by another ordinance; but all the evidence showed that the ordinance was preliminary to a condemnation proceeding for the purpose of widening the river and establishing the dock lines, that while the proceeding was still incomplete the council concluded to change the west line from the survey, and that the plan was never carried into effect. So far as the record shows, nothing further was ever done in the matter, and in 1881 an ordinance was passed for widening the river between Adams street and Van Buren street and condemning therefor certain premises, and a petition was filed in court for the condemnation of the same, but was never brought to trial. The evidence showed that the dock between Madison and Adams streets was originally constructed on the present line in 1856 and has been reconstructed several times on the same line. There was evidence that in making excavations between Adams street and Van Buren street it was found that the shore line was at some time west of the dock line and that there were remains of an old dock west of said line;

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but the present dock had existed for a great many years, and had been in the possession of the defendants, and so far as the evidence shows the dock was placed where the owners of the abutting land had the legal right to place it, not beyond the line of navigability of the stream, and not obstructing navigation or impairing the rights of others. *City of Chicago v. Laflin*. 49 Ill. 172. The greater part of the line was not in dispute, and there has never been any controversy between the city of Chicago and the defendants in regard to the location of the dock.

The station grounds are about 15 feet below the level of the adjacent streets, and Adams and Jackson streets are carried over the grounds by means of viaducts constructed by the railroad company under contracts and ordinances, and the defendants have the right to lay tracks on the grounds under the viaducts. Monroe street, from Canal street to the dock line, was vacated by the city of Chicago so long as it should be used for railroad passenger and depot purposes, and no longer. The lots abutting on the street had been sold and conveyed, and the plat, not being made, certified, and acknowledged in accordance with the statute, amounted to a common-law dedication, so that the abutting owners took title to the center of the street subject to the easement. On the vacation the title to the street was in the defendants as abutting owners, subject to the condition upon which the vacation was made. The passenger station does not extend from Canal street to the river. The passenger building extends across Monroe street next east of Canal street, and the train shed and passenger tracks are east of that building, but do not extend to the river. The defendants had been in possession of the premises since 1861. If there was a breach of the condition subsequent as to that part next the river, which the city could take advantage of, there had been no election by the city to do so by a re-entry or any equivalent act. The city never declared a forfeiture or took possession for a breach of the condition. The finding of the court was that the defendants were owners subject to the rights of the city of Chicago in the vacated streets, and the finding was not incorrect. On the trial before the jury the petitioner produced a number of witnesses, who had had experience in dealing in real estate in the city of Chicago, who testified that the strip to be appropriated to the uses of the petitioner had a market value by the square foot, and they gave their opinion as to such value, varying from \$8 to \$9.22 per square foot. An average of their testimony showed the value of the land taken to be \$503,012.06. The cost of building docks and improvements, including buildings, tracks, etc., was estimated by them at \$300,945.68, making a total of \$803,957.74. Adding to this the cost of handling freight at other points for one year during reconstruction of the terminal, which was estimated at \$82,887, the total compensation and damages would be \$886,844.74. On the part of defendants a number of witnesses, who were familiar with the nature of such property and the use to which it was devoted as a freight terminal and an

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essential part of the railway system, gave their opinion that the entire terminal property was worth about \$15,000,000, and that the value of the part taken, with the damage to the remainder, would be about \$5,000,000. The jury, as before stated, fixed the compensation and damages at \$1,389,940, which was above the estimates of the petitioner's witnesses and very far below the amount testified to by the witnesses for the defendants.

It is urged that the court permitted witnesses for the defendants to testify to the value of the property without qualifying themselves to give an opinion on the subject; and, on the other hand, it is insisted that the testimony of the witnesses for the petitioner was based on the value per square foot of real estate in the city of Chicago, **disconnected from the use to which** property was put as a railway terminal, divested of its character as such a terminal, and separated from the railway system of which it was an integral part. The property taken constituted part of the freight and passenger terminal of the railways of the defendants in the city of Chicago, and amounted to about one-sixth of such terminal, and it is conceded that it would be necessary to entirely reconstruct the freight department of the terminal station on a new plan, with new freight houses and new conveniences for doing business. The terminal was in the center of the largest manufacturing and commercial district in the city of Chicago, and had great practical advantages in being close to the center of traffic and therefore easily accessible. The witnesses for the petitioner stated that they took into account the use to which the property was put and its adaptability to such purpose, and that it had a market value, which they stated. But it is perfectly clear from their testimony that none of them had any definite idea of the value of the property to the owner in connection with the use to which it was put. Their estimates of value per square foot were on the basis of ordinary real estate sold in the market in that way. The witnesses for the defendants did not know the market value, by the square foot or otherwise, of property in the city of Chicago, and had not dealt in real estate in that way; but they knew the value of the property as a freight terminal, and were fully qualified to give their opinions on that subject. The jury were called upon to determine the value of an integral portion of a freight terminal which was a part of extensive railway systems, and the damage to the residue, and it was property which had no market value. Where lands proposed to be taken have a market value, such value is the standard of just compensation because it will give to the owner all he is entitled to under the law. But that method of valuation cannot be applied to property which has no market value. The Constitution and the law require that the owner of property shall receive such compensation that he will be as well off after the taking as he was before. To do that it is necessary to determine what the property is worth to the owner, and unless he receives what it is worth to him he does not receive just compensation. It is matter of common knowledge that such property

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as this and devoted to such a use is not bought and sold in the market or subject to sale in that way, and that such property has no market value in a legal sense. The property being devoted to a special and particular use, the general market value of other property was not a criterion for ascertaining compensation, although it might throw some light on the actual value.

One of the important considerations in ascertaining the value of property which has no market value is its productiveness and capabilities for yielding profits to the owner. The court admitted evidence of the extent of the business done at the terminal station, and witnesses for the defendant based their estimates of the value of the whole property, the part taken and the damage to the residue, upon the business handled at the station and the profits of such business. It is insisted that the court erred in admitting such evidence, which enabled the witnesses for the defendants to arrive at an intelligent estimate of the value of the property. We think there was no error in admitting the evidence. Although the profits of a business do not determine the value of land, it is proper to show, in arriving at the market value, that it is valuable for certain purposes and productive to the owner. *De Buol v. Freeport & Mississippi River Railway Co.*, 111 Ill. 499. The extent of the business done upon the property necessarily affected its value, and the profits of the business were neither made a test of value nor allowed as compensation. There was no ruling of the court or any instruction under which profits could be or were allowed, but the productiveness, capabilities, location, and amount of business done was a proper matter to be before the jury. It is conceded that the defendants had a right to show the use to which the property was devoted and how it was used at the time of filing the petition, and we think it was proper to prove, as bearing on its value, the amount of business transacted, the capacity of the property for such business, and its capacity for expansion to meet the increasing demands of business. Where property, by reason of being applied to a particular use, has a particular value to the owner, that value is to be ascertained and allowed as compensation. *Lake Shore & Michigan Southern Railway Co. v. Chicago & Western Indiana Railroad Co.*, 100 Ill. 21; *Chicago & Northwestern Railway Co. v. Chicago & Evanston Railroad Co.*, 112 Ill. 589; *Chicago & Western Indiana Railroad Co. v. Englewood Connecting Railway Co.*, 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173; *Chicago, Burlington & Quincy Railroad Co. v. City of Naperville*, 166 Ill. 87, 47 N. E. 734.

Complaint is made of the eighth instruction given at the request of defendants. The court had admitted in evidence returns for taxation made by the Pennsylvania Company, lessee of the owner, on which the value of the whole property was given at less than half the value as shown by the evidence for the petitioner. The instruction stated that the returns did not purport to be made by the Pittsburgh, Ft. Wayne & Chicago Railway Company, but by the Pennsylvania Company, the lessee; that said

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returns were not admitted as proving the value of the property on the market for sale or to the owner, but as having a bearing on the question of value; that it was the duty of the jury to determine the real value of the property, and unless the returns for taxation represented the real value the jury should award to the owner such real value. The defendants protested, and now protest, that the returns were not admissible in evidence. But that question is not before us on this appeal. On the question whether a return for taxation is admissible in evidence as tending to show the value of property there is a conflict of authority, and we do not express any opinion upon the subject; but they are not held, in any case, to be a criterion of value or conclusive. The returns did not purport to be made by the owner of the property, and therefore had no force as admissions of value, and, whether admissible in evidence or not, there was no error in giving the instruction to the effect that they were not conclusive.

In the statement of facts preceding the brief and argument of counsel in support of the errors assigned, there is a statement that the court gave an instruction informing the jury that under the law the petitioner had a right to stipulate and agree on the trial of the case as to the time after the entry of judgment when it would cut away the strip condemned, and that, no such stipulation or agreement having been made, if the jury found, from the evidence, that the time taken to remove the strip would enter into and affect the amount of damages to the remainder, they should estimate the same on the basis of what would be the ordinary and usual consequences of cutting away and removing the strip and the damages resulting therefrom. The instruction is not mentioned in the brief or in the argument in support of the brief, and therefore it is perhaps not necessary to notice it. It seems, from the statement of facts, to be regarded by counsel as objectionable, but there was no error in giving it. If the petitioner desired the damages assessed on the basis that it would do the work of removal in any particular manner or give any particular time for reconstruction and adjustment of the property to the uses to which it was devoted, or would do anything which would limit or restrict the damages resulting from the exercise of its legal right to remove the strip on payment of compensation, it should have presented some plan, stipulation, or agreement to that effect. If that had been done, the damages would have been assessed on the basis of the plan or stipulation; but in the absence of anything of the kind it was proper for the jury to assess damages in view of the legal right of the petitioner to enter upon the premises upon payment of the compensation ascertained.

We find no error in the record, and the verdict was not against the preponderance of the evidence. The judgment is affirmed.

Judgment affirmed.

BOYD v. CHICAGO & N. W. RY. CO. *et al.*

(Supreme Court of Illinois, Oct. 24, 1905.)

[75 N. E. Rep. 496.]

Master and Servant—Negligence—Independent Contractor.*—A railroad company is not liable for the negligence of an independent contractor, not exercising any special power derived from the charter of the railroad.

Same—Exercise of Charter Powers.*—Where an independent contractor was constructing a railroad on the right of way of a corporation, which retained only the right to see that the contract is performed, he was not exercising a special power derived from the charter of the corporation, so as to render it liable for his negligence.

Same—Evidence.*—Where a railroad company procured a right of way and contracted with an independent contractor for the grading of the same, it was not liable for an injury to a day laborer, hired by one to whom the contractor had sublet a portion of the grading, caused by the falling of an overhanging bank of earth while the laborer was shoveling into a car.

Error to Appellate Court, Second District.

Action by Charles L. Boyd, administrator, against the Chicago & Northwestern Railway Company and others. Judgment for certain defendants was affirmed by the Appellate Court, and plaintiff brings error. Affirmed.

Hiram Blaisdell and Oliver R. Barrett, for plaintiff in error.
Stevens & Horton, for defendants in error.

CARTWRIGHT, J. B. W. Goens was a subcontractor under George C. Smith for grading and preparing a part of the roadbed for a railroad track. Goens hired John Lyons as a laborer, and Lyons was injured by the falling of clay from the face of a bank in widening a cut, and died from his injuries. Plaintiff in error, as administrator of the estate of Lyons, sued Goens and Smith and the defendants in error, the Chicago & Northwestern Railway Company and the Peoria & Northwestern Railway Company, to recover damages, alleging that the death of Lyons was caused by negligence in respect to the bank and in the management and control of the work. At the close of the evidence for the plaintiff the court directed a verdict of not guilty as to the two railway companies and Smith, but denied a motion of Goens to direct a verdict of not guilty as to him. Goens then introduced evidence, after which, on motion of plaintiff, the court set aside the order directing a verdict as to Smith, and the plaintiff thereupon dismissed his suit as to Smith and Goens. A verdict was returned as to the railway companies in accordance with the direction of the court, and the plaintiff moved for a

*For the authorities in this series on the question whether a railroad company is liable for the negligence of an independent contractor working for its benefit, see foot-notes appended to *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253.

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new trial as to said companies. The court overruled the motion for a new trial and rendered judgment on the verdict. Upon a writ of error from the Appellate Court for the Second District the judgment was affirmed and a certificate of importance was granted, under which a writ of error was sued out of this court to review the judgment of the Appellate Court.

The Peoria & Northwestern Railway Company procured the right of way from Peoria to Nelson, on the Chicago & Northwestern Railway, and transferred the right of way to the Chicago & Northwestern Railway Company. The grading of the roadbed was done under a contract between the Chicago & Northwestern Railway Company and Winston Bros., of Minneapolis. Winston Bros. sublet a part of the grading to Smith, and Smith again sublet a part of what had been sublet to him to Goens. Lyons was hired by Goens, and was shoveling gravel into a car when the overhanging clay fell and struck him. Counsel are agreed as to the rules of law governing the liability of railway corporations in such cases, and the controversy relates only to the application of such rules to this case. A railway corporation will be held liable for the wrongful act of a contractor while exercising, with the assent of the corporation, some chartered power or privilege of the corporation which he could not have exercised independently of its charter; but it will not be liable for the wrongful act of an independent contractor not exercising any special power derived from the charter. 1 Thompson on Negligence, § 671; 3 Elliott on Railroads, § 1063.

In the brief and argument for plaintiff in error it is stated that, in order to establish the liability of defendants in error, the fact must appear "that the contractor was exercising, with the assent of the railroad companies, some power which he could not have exercised independently of their charter." A railway corporation takes the responsibility of seeing that no wrong is done through the exercise of its chartered powers by persons whom it permits to exercise them, and, if the corporation has a public or statutory duty to perform, the employment of an independent contractor with control of the work will not relieve it from liability. It must perform such duties or be liable for any negligence thereof. The question in this case is whether the construction of a railway by a contractor upon the right of way and property of the railway corporation is the exercise of chartered powers or privileges by the contractor, and it is answered in the negative by the decision in the case of *West v. St. Louis, Vandalia & Terre Haute Railroad Co.*, 63 Ill. 545. In that case the railway company contracted with a firm of contractors to construct its railroad and appurtenances. A servant of the contractors was injured by the use of a poisonous mixture upon the timbers of a freight house. It was decided that the railway company, in letting the contract, did not commit the execution of any of its franchises to the contractors, and that the contractors, in hiring the plaintiff, were only exercising their private and natural

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right, and not any special power derived from the charter of the corporation. The settled rule was recognized and stated, and the court pointed out that there was a radical difference between that case and previous ones in which a liability was imposed.

Every act of a corporation is done under its charter, in the sense that, if there were no corporation, it could not perform the act; but, if the act is one which might have been done by an individual, no different rule obtains as to liability merely because there is a corporation. Where a corporation was authorized by its charter to enter upon the premises of individuals and take therefrom materials for the constructions of its works, and provision was made for assessing the value of the materials taken and damages occasioned by reason of the taking, and judgment was to be rendered against the corporation for such value and damages, it was held liable for the act of a contractor in taking such materials. *Leshner v. Wabash Navigation Co.*, 14 Ill. 85, 56 Am. Dec. 494; *Hinde v. Wabash Navigation Co.*, 15 Ill. 72. Such an entry could only be made by virtue of the charter, and the privileges and liabilities of the charter attached to the corporation. Again, where acts of incorporation conferred the right to enter upon premises and construct a railroad track over them, and the work was let to contractors, who entered upon land and took down fences and left them down, resulting in the killing of stock or other damages, the corporations were liable. *Chicago, St. Paul & Fond du Lac Railroad Co. v. McCarthy*, 20 Ill. 385, 71 Am. Dec. 285; *Illinois Central Railroad Co. v. Finnigan*, 21 Ill. 646; *Chicago & Rock Island Railroad Co. v. Whipple*, 22 Ill. 105. In such cases the contractors were exercising chartered powers in entering upon the lands, and without the charters would have had no right to do so. A railroad corporation is liable for the performance of its duty to keep its road fenced, and can never relieve itself of the duty by committing the work to a contractor. So, also, a railroad company is liable for the trespasses of contractors engaged in constructing its road, in entering upon land without right and digging a ditch and making embankments. *Rockford, Rock Island & St. Louis Railroad Co. v. Wells*, 66 Ill. 321; *Cairo & St. Louis Railroad Co. v. Woosley*, 85 Ill. 370.

Plaintiff in error relies upon the decisions in *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N. E. 66, and *North Chicago Street Railroad Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796. Those cases were entirely different from this, and they also came within another principle which established the liability of the corporations. In both cases work was being done in the public streets of the city of Chicago, and in such a case there is an implied condition that the grantee of the license or permission will see to it that those using the streets are protected from unnecessary danger on account of the work. In such a case a duty is assumed by the corporation, and it can never relieve itself from the performance of the duty by committing the work to a contractor. The work, in such a case, is inherently

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dangerous to those using the streets, unless performed with proper care and properly guarded. Where work to be done in a street necessarily obstructs and renders it dangerous, the one for whom the work is done cannot avert liability for negligence in doing it by proving that he let the work to a contractor. 1 Thompson on Negligence, § 653. In the case of *Chicago & Grand Trunk Railway Co. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75, the controversy was whether the liability of the lessor extended to injuries suffered by servants of the lessee in the exercise of chartered powers in running trains over the road. Neither of those cases is applicable here, and the general doctrine is not accurately stated in *Toledo, St. Louis & Kansas City Railroad Co. v. Conroy*, 39 Ill. App. 351.

Plaintiff in error insists the railway companies are liable under the decision in *City of Chicago v. Murdock*, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221, on the ground that the Chicago & Northwestern Railway Company retained control and direction of the work. In that case the work was intrinsically and inherently dangerous, and in such a case the rule of respondent superior applies, although the work is done by an independent contractor. The commissioner of public works also had control of the manner and method of doing the work, with power to inspect, approve, or reject all material and labor, and to make alterations in the work. In this case the railway company had no control of the means by which the work was to be accomplished, and there was only a right of general supervision and inspection to see that the contract was properly performed. The contractor had control and direction of the methods and means for the performance of the work, and was an independent contractor, and not a servant of the railroad companies. *Elliott on Railroads*, *supra*.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

DRAKE *v.* SAN ANTONIO & A. P. RY. CO.

(Supreme Court of Texas, Oct. 26, 1905.)

[89 S. W. Rep. 407.]

Master and Servant—Duties of Master—Inspection of Appliances—Questions for Jury.—The question of a master's negligence in failing to inspect appliances used by his servants is, when there is room for reasonable differences of opinion, one for the jury.

Same—Safe Appliances—Duty to Furnish.*—In furnishing a tool of any kind, a master is bound to use ordinary care, the measure of which is to be determined from the circumstances of the case, for the safety of the servant who uses it.

*For the authorities in this series on the question of the care required of a railroad company, as an employer, in furnishing appliances, see foot-notes appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378.

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Same—Question for Jury.—In an action for injuries to a servant, caused by the slipping of a defective rail hook which the servant was using in unloading rails from a car, whether the master was guilty of negligence in furnishing the defective hook held, under the evidence, a question for the jury.

Same—Assumption of Risk—Unknown Dangers.†—A servant does not assume the risk resulting from his master's negligence in furnishing a defective tool, which exposes the servant to a danger which ordinary care in doing his work would not have brought to his knowledge.

Same—Questions for Jury.—Whether the defective condition of a tool used by a servant is so obvious that he necessarily assumes the risk of using it is, in doubtful cases, a question for the jury, to be determined, not merely from the simple character of the instrument itself and the openness of the defect in it, but from the situation and condition of the servant himself, his opportunity and capacity for discovering that condition, and the circumstances calculated to withdraw his attention from it.

Same.—In an action for injuries to a servant, caused by the slipping of a defective rail hook which the servant was using in unloading rails from a car, whether the servant assumed the risk held, under the evidence, a question for the jury.

Same—Contributory Negligence—Question for Jury.—In an action for injuries to a servant, caused by the slipping of a defective rail hook which the servant was using in unloading rails from a car, whether the servant was guilty of contributory negligence held, under the evidence, a question for the jury.

Same—Evidence—Mental Capacity of Servant.‡—In an action for injuries to a servant, the servant's mental capacity to understand the danger which he incurred and his reliance upon the superior ability of his foreman are matters which may be considered on the issues of assumed risk and contributory negligence.

†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-note appended to *Dunn v. Oregon Short Line R. Co.* (Utah), 16 R. R. R. 741, 39 Am. & Eng. R. Cas., N. S., 741; foot-notes appended to *Southern Pac. Co. v. Gloyd* (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; *Southern Ry. Co. v. Logan* (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374; *Philadelphia, etc., R. Co. v. Devers* (Md.), 16 R. R. R. 366, 39 Am. & Eng. R. Cas., N. S., 366; *Woods v. Northern Pac. Ry. Co.* (Wash.), 15 R. R. R. 365, 38 Am. & Eng. R. Cas., N. S., 365; *Chicago, etc., Ry. Co. v. Barnes* (Ind.), 14 R. R. R. 531, 37 Am. & Eng. R. Cas., N. S., 531; *Foster v. Chicago, etc., Ry. Co.* (Iowa), 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; *Murphy v. New York, N. H. & H. R. Co.* (Mass.), 14 R. R. R. 346, 37 Am. & Eng. R. Cas., N. S., 346; *Foster v. New York, N. H. & H. R. Co.* (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343; *Meehan v. Holyoke St. Ry. Co.* (Mass.), 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; foot-notes appended to *Shaw v. Manchester St. Ry.* (N. H.), 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

‡For the authorities in this series on the question of the right of an employee to rely on his master's performance of duties owing to him, see foot-note appended to *McCabe v. Montana Central R. Co.* (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564.

For the authorities in this series on the subjects of the assumption of risks by, and the contributory negligence of, servants in obeying orders exposing them to unusual dangers, see extensive note appended to *Illinois Cent. R. Co. v. Jones* (Ky.), 12 R. R. R. 372, 35 Am. & Eng. R. Cas., N. S., 372; foot-notes appended to *Southern Ry. Co. v. Logan* (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374; foot-notes appended to *Kansas City, M. & B. R. Co. v. Thornhill* (Ala.), 14 R. R. R. 851, 37 Am. & Eng. R. Cas., N. S., 851.

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Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by John B. Drake against the San Antonio & Arkansas Pass Railway Company. There was a judgment of the Court of Civil Appeals, reversing a judgment for plaintiff (85 S. W. 447), and plaintiff brings error. Reversed.

Williams & O'Connor, P. J. Lewis, and H. C. Carter, for plaintiff in error.

Houston Bros. and R. J. Boyle, for defendant in error.

WILLIAMS, J. Plaintiff in error, as plaintiff in the district court, recovered a judgment against defendant in error, as defendant, for damages for a personal injury sustained by plaintiff while in the service of defendant. This judgment was reversed by the Court of Civil Appeals on the ground that both the pleadings and evidence showed that "plaintiff has no case," and that court rendered final judgment in favor of defendant. The question is whether or not the Court of Civil Appeals, after having reversed the judgment, erred in finally adjudicating the controversy. No especial point arises in this connection upon the pleadings. Those of plaintiff state the facts which the evidence tends to show in their strongest light in favor of plaintiff, and if the evidence was sufficient to go to the jury the petition is necessarily sufficient to sustain a recovery. We shall therefore confine our discussion to the questions raised by the evidence.

Plaintiff was a member of a section gang in the service of defendant under the immediate superintendence of a foreman. On the day when plaintiff was hurt the men were engaged in loading flat cars with steel rails, in doing which some of them stood on the ground and placed the rails upon skids, one end of which rested on the car, and pushed them along the skids until they reached the edge of the car, when they were received by two other employees, standing on the car, and put in place. In thus placing the rails they were lifted or pulled by means of rail hooks, which were simple tools with a crook at one end, a handle at the other, and a stem about 20 inches long; the crooked end being inserted in the bolt holes in the rails. Plaintiff had been working on the ground until just before the accident, when he was ordered by the foreman to go upon the car and assist another in handling the rails. A rail hook had already been placed upon the car, and plaintiff took and used it in his work. After he had handled in the manner stated from three to five rails, the hook, because it was worn and was too small and not sufficiently curved, slipped from the hole in a rail as plaintiff was pulling upon it, whereby he was caused to lose his balance and fall from the car and suffer the injuries of which he complains. He had had previous experience in thus handling rails and in the use of such hooks, but it does not appear that he knew of the presence of any defective ones. He testified that he did not notice the defective condition of the hook until he had fallen, when he ex-

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amined it, and at once saw that it was in the condition stated. He was ordered by the foreman, when he went upon the car and continually while doing the work, to "hurry up and get the rails out of the way," and he says that he had no occasion to examine the hook—"had to pick it up as I came"—and thought it safe. He admits, however, that he had to see the hook in inserting it in the bolt holes. He did not select the particular hook, but found it upon the car, where one was usually put for use when such work was being done, and he states that "nobody knew anything about the hooks until he was on the car; he never climbed on the car with the hook; he found it up there." This statement will be sufficient to indicate the questions of fact and law to be passed upon.

The first question is whether or not the evidence raises an issue of fact for the jury as to the master's negligence, and in determining this the facts are to be considered in their combination, and an answer found to the inquiry whether or not they warrant a reasonable opinion that there was wanting on the master's part that ordinary care exacted by the law for the safety of his employee. This is not to be determined, in a case like this, by any hard and fast rules of law as to the duty of inspection, but by the judgment of rational minds upon the facts, and, if there be room for reasonable differences of opinion, the judgment of a jury must be taken. No solution of the question is reached by saying, as was said in the Larkin Case (Tex. Sup.) 82 S. W. 1026, that the duty of ordinary care did not require of the master that regular and careful inspection of this simple tool which is essential to such care in relation to more complicated and dangerous machinery and appliances. With that much conceded, it is still true that, in furnishing a tool of any kind, the master is bound to use ordinary care for the safety of the servant who uses it. What shall be considered as constituting such care must be determined from the circumstances of each situation as it arises. It is true that oftentimes the character and condition of an implement are so plain that the master cannot be said to have been guilty of neglect of the duty because he has left it to the servant to see and know for himself all that was essential to his safety; but this assumes that there has been sufficient opportunity on the servant's part to ascertain in the prudent use of the thing the risks to be avoided. If the master actually puts into the hands of his servant an implement, which the master ought to know to be in a dangerous condition, for such immediate and hurried use that the servant is likely to use it without opportunity to see the defect and the attendant danger, and to receive injury, the master's liability for an injury thus caused would scarcely be denied. This case is not clearly of that character, and is, it must be confessed, a very close one; but we are of the opinion that the circumstances as stated in plaintiff's evidence, the tendency and effect of which we shall not discuss at length, were such as to entitle him to have a jury determine the question of negligence vel non of the defendant upon a consideration of all the facts.

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The question of assumed risk depends upon the same considerations. If there was negligence on the part of the defendant in furnishing a tool which, because of its unfitness for the use to which it was to be put, exposed plaintiff to a danger which the exercise of ordinary care in doing his work would have brought to his knowledge, he cannot be held to have assumed the risk resulting from his employer's negligence. Whether or not the condition of a tool is so obvious that a servant necessarily assumes the risk of using it must depend, in some cases, not merely upon the simple character of the instrument itself and the openness of the defects in it, but also upon the situation and condition of the servant himself, his opportunity and capacity for discovering that condition, and the circumstances calculated to withdraw his attention from it; and the test in doubtful cases is the judgment of a jury upon the question whether or not persons of ordinary prudence similarly situated would have discovered the risk. Upon this, as well as upon the questions as to the defendant's negligence and that of contributory negligence, the evidence presented matters for the determination of the jury.

A ruling of the trial court upon exception to plaintiff's petition, in striking out allegations as to plaintiff's mental capacity to understand the danger which he incurred and his reliance upon the superior ability of his foreman, was discussed in argument, and we deem it proper to say that such matters may properly be considered in connection with the defenses of assumed risk and contributory negligence. No allegation was made of knowledge on the part of defendant of such facts, as they were not stated as affecting the question of defendant's negligence, but were relied on merely as circumstances influencing the decision of the other issues named. For that purpose they were legitimate. In *Marsh v. Chickering*, 101 N. Y. 399, 5 N. E. 56, it is said: "In considering the application of the rule just stated, due regard must be had to the limited knowledge of the employee as to the machinery and structure on which he is employed and to his capacity and intelligence, and to the fact that the servant has the right to rely upon the master to protect him from danger and injury and in selecting the agent from which it may arise." Many other authorities, the results of which are believed to be correctly stated in *Labatt's Master and Servant*, § 402a, are to the same effect.

In support of the decision of the Court of Civil Appeals reliance is placed upon the decision of this court in the *Larkin Case*, *supra*; but it does not, as we have indicated, reach the questions of fact arising from the evidence before us. It was held in that case that a master is not required to inspect simple tools and appliances which he furnishes to his servants, as he is required to inspect more complicated and dangerous instrumentalities with which the servant is brought in contact; but it was not held there that the mere simplicity of the tool would exempt the master from all care in every situation in which he might require the servant to use it. Neither that nor any other well-considered

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case goes to such a length. Larkin was hurt by the breaking of the globe of a lantern while he was cleaning it. There was nothing to indicate negligence on the part of the railroad company, except the omission to inspect the lantern, and, as it was in Larkin's custody, to be used and kept in proper condition by him, it was held that no duty of inspection existed, with reference to him at least, to ascertain matters which he could learn as well as any inspector. And we do not hold that the duty of general inspection was upon the defendant in this case with reference to tools like that in question, but merely that it is a question of fact whether or not the defendant furnished to plaintiff this hook under circumstances showing a want of ordinary care for his safety, and whether or not plaintiff knew or ought to have known its condition, and assumed the risk or was guilty of negligence in using it as he did. In the cases of *Railway Company v. Smith* (Tex. Civ. App.) 83 S. W. 719, *Railway Company v. Scott* (Tex. Civ. App.) 62 S. W. 1077, and many others that could be cited, it appeared that the plaintiff either actually knew of the condition of the implement of which he complained, or that he had such opportunities of knowing as to conclusively show that he ought to have known. Each case necessarily depends on its own facts, when the question is whether or not there is evidence to go to the jury, and a decision of the question upon one state of facts is usually of little help in a different case.

For the reasons given, we are of the opinion that the Court of Civil Appeals erred in rendering final judgment, and that part of its judgment is reversed, and the cause remanded.

Reversed and remanded.

ILLINOIS CENT. R. CO. *v.* QUIREY.

(Court of Appeals of Kentucky, Oct. 20, 1905.)

[89 S. W. Rep. 217.]

Master and Servant—Injuries to Servant—Instructions.*—Where a locomotive fireman was injured by a boiler explosion, and in an action for the injuries the court instructed that if the explosion was caused by the defective condition of the boiler, and that defendant or its engineer in charge of the engine knew, or could have known by ordinary care, of such condition in time to have avoided the accident, plaintiff was entitled to recover, the instruction was not objectionable

*For the authorities in this series on the question whether the engineer is the fellow servant of the other members of his train crew, see foot-notes appended to *Peterson v. New York, etc., R. Co.* (Conn.), 15 R. R. R. 772, 38 Am. & Eng. R. Cas., N. S., 772.

For the authorities in this series on the question whether employees charged with the duty of inspecting appliances, etc., are the fellow servants of the other employees of the railroad company, see foot-notes appended to *Fullmer v. New York Cent., etc., R. Co.* (Pa.), 13 R. R. R. 817, 36 Am. & Eng. R. Cas., N. S., 817; *Hamilton v. Michigan Cent. R. Co.* (Mich.), 12 R. R. R. 365, 35 Am. & Eng. R. Cas., N. S., 365.

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on account of the phrase "or its engineer in charge of the engine knew, or by the exercise of ordinary care could have known," etc., on the theory that it makes defendant liable for the negligent act of the engineer; he, as to the inspection, being a vice principal.

Damages—Injury to Person—Excessive Damages.—In an action for injuries sustained by a locomotive fireman, it appeared that he was considerably burned and scalded; that three or four ribs were broken, the broken ends breaking the pleura and piercing the lung; that his injuries were so severe that he remained in a hospital from January until July; and that from the time of the injuries to the time of trial plaintiff had been obliged to have a tube in his side. Physicians testified that his lung was largely destroyed and the injury permanent. At the time of the injury, plaintiff was a strong man 22 years old. Held, that a verdict for \$7,000 was not excessive.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Frank R. Quirey against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Wheeler, Hughes & Berry, J. M. Dickinson, and Trabuc, Doolan & Cox, for appellant.

Hendrick & Miller, for appellee.

NUNN, J. The appellee on the 11th of January, 1903, was in the employ of appellant as fireman on one of its freight engines, and in making a trip on the same from Paducah, Ky., to Memphis, Tenn., and while at or near a point called Curve, Tenn., the crown sheet of the engine blew out, by reason of which appellee was burned and scalded, which compelled him to jump from the engine, and he fell on some cross-ties and was severely injured. On the 22d of December, 1903, appellee instituted this action to recover damages for his injuries. On the trial he recovered a verdict and judgment for \$7,000, of which appellant complains. The grounds for reversal, as presented by appellant's brief, are that the court erred in refusing to give peremptory instructions to find for it; that the court erred in giving instructions Nos. 2 and 4; and that the verdict is excessive.

From the record it appears that appellee alleged in his petition, in substance, that his injuries were received as a result of the combined and concurring negligence of the appellant in furnishing and placing him upon a defective, unsafe, and dangerous engine and machinery, and the negligent management and operation of same by those in charge thereof superior in authority to him; that the appellant knew, or by the exercise of ordinary care could have known, in time to have prevented his injury, of the defective, unsafe, and dangerous condition of this engine and machinery; and that he did not know it. The appellant traversed by answer the petition, and in the second paragraph alleged, in substance, that plaintiff received his injuries in the state of Tennessee, and that by the laws of that state the appellee and the engineer were fellow servants, and that the explosion of the engine, whereby the crown sheet was blown out, was caused

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solely by the engineer in charge of the engine allowing the water in the engine to become too low, or by a lack of water in the engine, which produced the explosion, causing the appellee to jump from the engine, and that under the laws of the state of Tennessee it is not responsible for the carelessness or the negligent act of its engineer. By another paragraph it pleaded contributory negligence on the part of appellee as a bar to his recovery. The appellee, by reply, traversed the affirmative matter of the answer, and also denied that the Tennessee law applied to the case, and then alleged, in substance, that by the laws of the state of Tennessee the company was liable to him if the negligence of his fellow servant was coupled with the negligence of the company in furnishing a defective, unsafe, and dangerous engine and machinery, provided the negligence of both combined to cause the injury. He then denied that the negligence of the engineer alone caused the injury, and alleged that it was the concurring negligence of the engineer and the appellant. He further alleged that the engineer was in charge of the engine and machinery, and that it was his duty to keep the same in repair and discover any defects therein, and that in this he represented the master, the appellant. Appellee also denied the contributory negligence of himself, and alleged that the law in Tennessee as to contributory negligence is that the contributory negligence of the plaintiff does not defeat and is not a bar to his claim, but goes merely in mitigation of damages, and that this was the law in that state at the time he was injured. The appellant filed a rejoinder, in which it denied all the affirmative matter of the reply with reference to the laws of Tennessee, except the allegation regarding contributory negligence.

Upon these issues appellant took the depositions of two lawyers of the state of Tennessee, who proved that the fireman and the engineer, in the management and operation of the engine, were fellow servants, and if appellee received his injuries as the result of the negligent management and operation of the engine by the engineer the appellant was not liable. They also proved that if the engine and the machinery were defective and dangerous, which fact was known or could have been known to the company by the exercise of ordinary care and diligence, and if by reason of such defects the explosion and injuries occurred, then the company would be liable. They also proved that, if the injury resulted by the concurring acts of negligence of the company and the fellow servant, then the company would be liable; but, if the negligence of the fellow servant itself caused the explosion regardless of the defects of the engine, then the company would not be liable. The court gave two instructions to the jury predicated upon the Tennessee law as proven in the depositions referred to. The third instruction was the definition of ordinary care. The fourth was one on contributory negligence based upon the laws of Kentucky. The court stated in the first one that it was advised by the depositions of the lawyers that the appellee and the engineer in charge of the engine were fellow

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servants, and, if the jury believed from the evidence that the explosion or blowing out of the crown sheet of the engine was caused by the negligence of the engineer in charge, they should find for the defendant. This, under the Tennessee law, was proper. In instruction No. 2 it told the jury that if the explosion or blowing out of the crown sheet was caused by the defective condition of the boiler, crown sheet, or other attachment thereto, and should further believe from the evidence that the defendant or its engineer in charge of the engine knew, or by the exercise of ordinary care could have known, of the defective condition of the boiler, crown sheet, or other attachment in time to have avoided the explosion, then they should find for the plaintiff, etc.

The appellant objects to this instruction No. 2 in the use of the words "or its engineer in charge of the engine knew, or by the exercise of ordinary care could have known," etc. It claims it has the effect to make it liable for the negligent act of appellee's fellow servant. We do not so understand it. Under the law of Tennessee, as well as this state, it is the duty of the appellant and its agents representing it in the matter to furnish its employees reasonably safe machinery and appliances with which to labor, and to keep them in reasonable safe condition and repair for their protection. This language was used in the instruction upon the idea that in the control, management, and operation of the engine the engineer was the fellow servant of the fireman, but in the repair of it on the road and in discovering its defects he represents the master and is the vice principal. This part of the instruction is supported by the uncontradicted evidence of the appellee to the effect that the engineer was in charge of the engine, and that it was his duty, under the rules of the company, to look after the engine and its appliances and to keep it in condition along the road.

Instruction No. 4, complained of by appellant, ought not to have been given, assuming that the case should have been tried under the Tennessee law. The giving of it was more favorable to appellant than it was entitled to. In such case the court should have given the one offered by the appellee, to the effect that contributory negligence was not a defense, but could only be considered by the jury in mitigation of damages. Again, assuming that the case should have been tried under the Tennessee law, the court should have given the instruction offered by the appellee on the question of the concurrent negligence of a fellow servant of the appellant. It is unnecessary to consider in detail the evidence with reference to the defective and unsafe condition of the engine and machinery; but we have examined it with care, and we are of the opinion that there was sufficient evidence on that point to authorize that question to be submitted to the jury.

The only other thing to be considered is the question of excessive damages. The proof shows that he was considerably burned, scalded, and otherwise seriously injured by his fall upon the cross-ties; but his most serious injury was from the breaking of three or four ribs in his right side, the broken ends breaking

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the pleura and piercing the lung. His injuries were so severe that he remained in the hospital in Paducah from January until July, with a tube in his side to allow the pus to escape; that after July, for a time, his side healed over, but soon thereafter it had to be reopened and the tube put back, and then it healed over again and afterwards burst; and from that time to the time of the trial, 16 or 17 months after his injury, his side has remained open, with a tube in it to allow the pus to escape. It was in that condition at the time of the trial, and was exhibited to the jury. The physicians testified that the greater portion of his right lung was destroyed and that his injury was permanent. Considering the extent of his injuries as proven, and the further fact that at the time he was injured he was a strong, healthy young man, 22 years old, weighing about 180 pounds, while at the time of the trial he was a mere physical wreck, weighing only about 130 pounds, we are unwilling to say that the verdict is excessive.

Wherefore the judgment is affirmed, with damages.

CHICAGO & A. RY. CO. v. WALTERS.

(Supreme Court of Illinois, Oct. 24, 1905.)

[75 N. E. Rep. 441.]

Appeal—Exclusion of Evidence—Harmless Error.—In an action by a brakeman, injured while coupling a car, a refusal to allow him to state whether he signaled the engineer, who was under his control, to stop or go slower, when he found he had to use his hand on the coupler, was harmless error, where there is evidence showing that he did not do so.

Same.—Error in not sustaining objection to a question asking for conclusion is harmless, where the witness did not give his conclusion in his answer to the question.

Master and Servant—Injury to Servant—Defective Appliances.*—In order to charge a railroad company with notice of a defective car, it is not necessary that such notice be given to the particular official designated by its rules.

Same—Contributory Negligence—Question for Jury.†—Where a brakeman, in making a coupling, is required to act promptly under

*For the authorities in this series on the question whether knowledge of railroad officers or employees is, or is not, notice to their respective companies, see foot-notes appended to *Havens v. Rhode Island Suburban Ry. Co.* (R. I.), 13 R. R. R. 549, 36 Am. & Eng. R. Cas., N. S., 549.

†For the authorities in this series on the question what is, and is not, contributory negligence on the part of employees when engaged in coupling or uncoupling cars, see foot-notes appended to *Taylor v. Boston & M. R. R.* (Mass.), 16 R. R. R. 397, 39 Am. & Eng. R. Cas., N. S., 397; foot-notes appended to *Brinkmeier v. Missouri Pac. Ry. Co.* (Kan.), 15 R. R. R. 349, 38 Am. & Eng. R. Cas., N. S., 349; extensive note, 13 R. R. R. 498, 36 Am. & Eng. R. Cas., N. S., 498.

For the authorities in this series on the question whether it is contributory negligence in an employee to attempt to do his work by a more dangerous method than one he might use, see foot-notes appended to *Brinkmeier v. Missouri Pac. Ry. Co.* (Kan.), 15 R. R. R. 349, 38 Am. & Eng. R. Cas., N. S., 349.

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circumstances which he did not anticipate, that he might have adopted a safer course than the one he followed does not make the question whether his act was negligent one for the court, where there is evidence that he believed he had time to act as he attempted to do.

Appeal—Instructions—Harmless Error.—Where, in an action by a brakeman for injuries in making a coupling, he testified that he knew of the defect in the coupling before the injury occurred, an instruction as to the law applicable, if the defect was not discoverable by plaintiff, though erroneous, is harmless error.

Appeal from Appellate Court, Third District.

Action by William T. Walters against the Chicago & Alton Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

De Mange & Hoblit (F. S. Winston, of counsel), for appellant.

Louis Fitzhenry and Barry & Morrissey, for appellee.

CARTWRIGHT, C. J. Appellee recovered a judgment in the circuit court of McLean county against appellant for \$4,000 damages for the loss of a hand while coupling cars as a brakeman. The Appellate Court for the Third District affirmed the judgment. Appellant complains of alleged erroneous rulings of the trial court on the admission of evidence, the refusal to direct a verdict of not guilty at the close of all the evidence, the giving of instructions requested by appellee, and the refusal of instructions asked by appellant. The grounds of liability alleged in the declaration were, first, that the defendant, being engaged in interstate traffic, failed to equip a certain caboose with an automatic coupler, which would couple it automatically by impact with other cars, as required by the act of Congress; and, second, that, having attempted to equip the caboose with an automatic coupler, the defendant permitted it to be and remain in a dangerous and unsafe condition, which was known to the defendant and unknown to plaintiff, and thereby his hand was crushed between the drawbars of the engine and caboose while attempting to couple them together in the exercise of ordinary care for his own safety.

Plaintiff was a freight brakeman for defendant, and was called out at Brighton Park on the night of January 3, 1903, to assist in taking a train to Bloomington. He went to the engine house, and got the engine, and started with it to couple on the caboose. He had entire control of the engine, which was moved by the engineer in accordance with his signals. The engine and caboose were both equipped with Janney couplers, which would couple automatically by impact, provided the knuckle on either coupler was open, but would not couple in that way unless one or the other was open. When closed, the knuckle was kept closed by an iron lock pin inserted through it. The knuckle was to be opened by hand, and in order to open it the lock pin must be lifted out of the coupling. There was a device for lifting the lock pin from the side of the caboose without going between

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the cars, consisting of a lifting lever extending horizontally above the floor to the outside of the caboose, where it turned at a right angle to form a crank or handle; but there was no device or appliance for opening the knuckle. It was the duty of the plaintiff to see that the knuckle upon the engine or caboose was open when they came together, and on this occasion they were both closed. In the ordinary use of the coupling, he would lift the pin out by means of the lever from the side of the caboose and then open the knuckle with his hand. It was about midnight, and plaintiff stood upon the footboard of the tender and signaled the engineer to back the locomotive slowly toward the caboose. It was dark, and plaintiff had a lantern to enable him to see. He attempted to open the knuckle of the coupler on the engine, but the water had splashed upon it and frozen it fast. The engine was backing very slowly, not faster than a man would ordinarily walk, and in the judgment of the engineer not more than one mile an hour. Plaintiff, finding he could not open the knuckle on the engine, jumped off and ran ahead to open the knuckle on the caboose. He tried to work the lever and raise the pin; but the lever was bent, so as to strike the brake rod, and he was unable to lift the pin sufficiently to allow the knuckle to open. The lever had been bent and unfit for use for about two weeks, and its condition had been reported to a car repairer at Bloomington three or four days before the accident. Plaintiff, being unable to raise the pin with the lever, reached in with his left hand to the coupler and lifted the pin, and at the same time opened the knuckle with his right hand, when the couplers came together and his hand was crushed.

In entering the employ of defendant, plaintiff by his written application agreed to study the rules of the company and obey them, and stated that he understood in coupling cars the rules required him to use a coupling stick. The rules printed in the time-card in force strictly prohibited coupling by hand in all cases where a stick could be used in guiding the link or shackle, and all brakemen were required to provide themselves with a stick for that purpose; and the rules stated that going between the cars while in motion was a violation of duty. Plaintiff in his testimony narrated the circumstances of the accident substantially as above stated, which was all the evidence on the subject. On his cross-examination he was asked whether, when he found he could not open the knuckle on the engine, he gave the engineer any signal to go slower or stop. The court sustained an objection to the question, and therein erred. Plaintiff testified that he had entire control of the movements of the engine, and the question was legitimate and proper cross-examination. It was pertinent for the purpose of showing to the jury that the injury to the plaintiff resulted from his own failure to signal the engineer to go slower or stop until the coupler was prepared for the coupling. The other evidence, however, showed that plaintiff gave no signal to the engineer, but permitted the engine, which was under his control, to move forward toward the ca-

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boose until the accident occurred, and the fact was not controverted. The ruling, although erroneous, did no harm.

On the cross-examination of a witness for the plaintiff, he was asked whether a coupler in which the lever would not lift the pin out of the coupling would couple automatically by impact. The court overruled an objection of defendant to the question. The objection should have been sustained, for the reason that the question called for a conclusion by the witness as to the ultimate fact which the jury were impaneled to try, and which was in issue under the first count of the declaration. The ruling, although wrong, is not ground for reversal, for the reason that the witness did not undertake to answer the question and give his conclusion, but merely stated in his answer facts which were proper to go to the jury to enable them to decide the issue.

At the close of the evidence the defendant asked the court to direct a verdict of not guilty, and the court denied the motion. It is insisted that the court erred, for the reason that there was no evidence fairly tending to sustain plaintiff's averment that he was in the exercise of ordinary care for his own safety, and that the evidence clearly showed that the accident happened by reason of his negligence. There was evidence tending to show that the caboose was used in interstate traffic. The coupler was one that would couple cars automatically by impact, if the coupler on one or the other of the cars was prepared for coupling by raising the lock pin out of the coupling by means of the lever and opening the knuckle by the hand. This might be done while the cars were standing still or before they were brought together; but there was evidence tending to prove that, in the ordinary operation of switching and coupling cars together, there was a necessity to go between the ends of the cars to open the knuckle. A brakeman could prepare one or the other of the couplers by opening the knuckle, and then be out of the way when they came together; but in our opinion the trial court would not have been justified in directing a verdict on the ground that the coupler was as a matter of law one that would couple automatically by impact. Whether that is so or not, the lifting lever by which the pin was raised from the outside of the car was out of repair, and had been for two weeks, and the defendant had disregarded its duty to the plaintiff in respect to it. It is said that the defendant had no actual notice of the condition of the lever, because notice was given to one of the car repairers at Bloomington, while the rules required that notice be given to an official or employee mentioned in such rules. The court so instructed the jury, but the instruction should not have been given. The lever had been out of condition for two weeks, and it was not necessary that notice of its condition should be given to some particular official. It was the duty of the defendant to make proper inspection and repair, and this duty was a positive one owing by the defendant to the plaintiff. It made no difference by whom or what method the defendant provided by its rules for the per-

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formance of its duty, and there was no room for doubt that it had been derelict.

The serious controverted question in the case was whether the accident was due to negligence on the part of plaintiff. The approaching locomotive was under his control, and he gave the engineer no other signal than the one to back slowly. His act was a dangerous one, which might have been performed by a safe method by stopping the engine until the knuckle was opened. He had full knowledge of the condition of the lever, and knew the rate of speed at which the engine was backing under his direction. On the other hand, there was evidence proper to be considered by the jury tending to show that the plaintiff had reasonable ground to believe that he had time to raise the pin and open the knuckle in safety. It was in the nighttime, and he knew nothing about the condition of the lever until he attempted to use it. He was then confronted with a situation which he had no reason to anticipate, and there was not much time for reflection and deliberation. Immediate action was required, and, while he undoubtedly might have adopted a different and safe course in making the coupling, the question whether a brakeman of ordinary care and prudence would have done as he did was, in our opinion, proper to be submitted to the jury under all the evidence. Whether the verdict of the jury was sustained by a preponderance of the evidence was a question for the trial court on a motion for a new trial, and for the Appellate Court on appeal. The question on which side the preponderance of the evidence was could not properly be determined by the court on a motion to direct a verdict.

The court gave at the instance of the plaintiff instructions numbered 1 and 6. In the first of these instructions the jury were told that, if the condition of the coupling apparatus and the effect thereof were not discoverable by the use of ordinary care, the plaintiff could not be held to have assumed the risk of the defective condition; and by the sixth they were told that if the apparatus was out of repair, and its effect on the lever and knuckle was not discoverable by ordinary care, the rule of defendant requiring the examination of machinery, cars, etc., by employees would have no application to the case. The instructions were not based on any evidence or fitted to the facts of the case. Plaintiff testified that he discovered the condition of the lifting rod and its effect upon the apparatus and the lifting of the lock pin, both by sight and his attempt to use it before the accident happened. The question what the law would be, if the case had been different and the defect had not been discoverable by the use of ordinary care, was entirely foreign to the case, and would not aid the jury in deciding it. The only object of instruction is to enable the jury to apply the law to the evidence, and the practice of advising them as to what the law would be in some other case or applied to some other state of facts is bad. We cannot see, however, that the giving of these instructions

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worked any injury to the defendant, for the reason that there was no contradiction of plaintiff's evidence that he knew exactly what the condition of the lever was and what the effect of such condition upon the apparatus was. The jury could not possibly have concluded that plaintiff did not discover the condition of the lever and its effect, and therefore could not have applied the rules given by the court applicable to such facts.

The court refused several instructions asked by the defendant, but it is not necessary to repeat them. Everything contained in them which was correct as a proposition of law was contained in other instructions which were given.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

ROOT v. KANSAS CITY SOUTHERN RY. CO.

(Supreme Court of Missouri, Division No. 1, March 30, 1906.)

[92 S. W. Rep. 621.]

Master and Servant—Injuries to Servant—Contributory Negligence.*—Where a brakeman riding on the engine saw that it could not be stopped before it reached the burning portion of a low trestle jumped when the engine was about two car lengths from the fire, he was not guilty of contributory negligence.

Same—Assumption of Risk—Knowledge of Danger.†—A freight brakeman, who had been employed but a few days and had passed over a certain trestle but six times, usually in the night, and who was not shown to have had any knowledge of the conditions about the trestle, did not assume the risk arising from a quantity of combustible material allowed to accumulate about the trestle, and which became ignited and set fire to the trestle.

Same—Concurrent Negligence of Master and Fellow Servant—Liability of Master.‡—Where a servant is injured through the combined negligence of the master and a fellow servant, he may recover from the master.

Same—Action for Injuries—Question for Jury.—In an action by a brakeman for injuries sustained by jumping from an engine through fear that it would go through a burning trestle, evidence held sufficient to justify submission to the jury of the question whether the fire was communicated to the trestle through combustible debris which it was alleged defendant railroad company negligently allowed to accumulate about the trestle.

*For the authorities in this series on the question whether failure to exercise good judgment in avoiding impending danger, caused by fright, is contributory negligence, see foot-note appended to *Pierson Lumber Co. v. Hart* (Ala.), 18 R. R. R. 791, 41 Am. & Eng. R. Cas., N. S., 791; *Chicago Union Traction Co. v. Newmiller* (Ill.), 18 R. R. R. 273, 41 Am. & Eng. R. Cas., N. S., 273; foot-note appended to *South Chicago City Ry. Co. v. Kinnare* (Ill.), 18 R. R. R. 229, 41 Am. & Eng. R. Cas., N. S., 229.

†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Houston & T. C. R. Co. v. Turner* (Tex.), 18 R. R. R. 630, 41 Am. & Eng. R. Cas., N. S., 630.

‡See note at end of case.

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Same—Negligence of Master.—In an action by a railroad brakeman for injuries resulting from jumping from an engine, through fear that it would go through a burning trestle alleged to have been ignited because of the negligence of the railroad company in allowing combustible material to accumulate about it, evidence held sufficient under the law of Arkansas to justify submission to the jury of the question of defendant's negligence.

Same—Evidence—Defective Condition—Remoteness.—In an action by a railroad brakeman for injuries caused by jumping from an engine, through fear that it would go through a burning trestle claimed to have been ignited because of the negligence of the railroad company in allowing combustible material to accumulate about it, the admission of evidence that several months before the accident quantities of driftwood had floated down and lodged against the trestle was erroneous, in the absence of any evidence that the driftwood still remained there at the time of the accident.

Trial—Objections to Evidence—Necessity of Renewing.—Where objection was made on the ground that certain evidence was too remote, and was overruled in view of a promise by counsel to show that the condition revealed by this evidence continued down to the time to which the issues related, the party objecting to the evidence was not required, after failure to introduce connecting evidence, to renew the objection by motion to strike out.

Master and Servant—Action for Injuries—Proof and Variance.—Where, in an action by a railroad brakeman for injuries caused by jumping from a locomotive, through fear that it would go through a burning trestle the petition alleged that defendant negligently allowed driftwood, which was carried down the stream under the trestle at high water period, to remain lodged about the trestle, rendering it liable to take fire, evidence that at the time the right of way was originally cut through the timber logs were left lying on the right of way was outside the issues.

Evidence—Expert Witnesses—Examination—Hypothetical Question.—A hypothetical question to an expert witness must be predicated on the testimony.

Master and Servant—Action for Injuries—Instructions.—In an action by a railroad brakeman for injuries caused by jumping from an engine because of fear that it would go through a burning trestle, alleged to have been ignited because of negligence of the railroad company in allowing combustible materials to accumulate about it, an instruction that it was the duty of defendant to use ordinary care to keep its right of way free from dry and combustible matter which would be "liable" to take fire was erroneous, because of possibility of the word "liable" being construed to mean within the range of possibility.

Same—Negligence—Question for Jury.—Leaving combustible material on the right of way is not necessarily negligence on the part of a railroad company, though the extent of such material and its proximity to the track may justify a jury in finding negligence.

Appeal from Circuit Court, Bates County; W. W. Graves, Judge.

Action by Eugene R. Root against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

S. W. Moore, Cyrus Crane, and H. C. Clark, for appellant.

Thos. J. Smith, W. O. Jackson, and Geo. W. Wright, for respondent.

LAMM, J. Root was head brakeman riding on the engine of

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one of defendant's freight trains of seven cars and a caboose, four cars laden with coal and three with hay. In running south at midnight on July 16, 1901, a mile or so south of a station named Poteau, in the Indian Territory, as the engine approached a long trestle spanning a depression, swamp or slough (called a creek by some witnesses) through which water flowed from the west to the east at flood times in Poteau river, a nearby stream, a fire was discovered in and toward the far end of the trestle, as near as we can determine from the evidence, about 1,000 feet away from the engine at the time. The engineer applied his emergency air, slowed up, but did not stop before the engine reached the fire. Facing this emergency, when the fact became apparent that the engine would not stop before reaching the burning part of the trestle, on the advice of the engineer and by common consent, all employees on the engine, to wit, the engineer, the fireman, and plaintiff, jumped from its steps to the ground, a distance of from 10 to 12 feet. By jumping plaintiff's right ankle was concededly injured, and it is claimed on one side and controverted on the other that by the jump and by being struck in the small of the back by a rail, which bulged out simultaneously with his jump, kidney and spinal troubles ensued, resulting in traumatic neurasthenia, paralysis, and a group of associated ills. Plaintiff had judgment below for \$8,000, from which defendant appealed.

The paper issues were as follows: The petition alleges in effect that the country in the vicinity of the trestle was timbered; that defendant negligently allowed quantities of timber, brush, leaves, driftwood, and other combustible matter, carried down at high water and lodged under said trestle, and upon the right of way adjacent thereto, to accumulate and remain thereunder and upon said right of way, particularly under the south end of said trestle, until the date of the accident; that the creek spanned by the trestle and the water supply thereof, licked up by a drought, dried away; that said matter, so lodged and accumulated, became inflammable and susceptible to ignition from sparks and coals of fire from defendant's passing locomotives and from prairie and forest fires then raging in the region; that the drought had lasted for 30 days; that the trestle was constructed of wood and became dry and inflammable and in danger of catching fire from passing locomotives and from forest and prairie fires, all of which was known by defendant, or by the exercise of ordinary prudence could have been so known for more than 30 days prior to the injury of plaintiff; that defendant negligently failed to exercise care to remove said combustible matter from beneath said trestle and from its right of way, or to keep and maintain constantly a watchman, patrolman, or guard to watch and guard said wooden trestle after the passage of trains and for the purpose of discovering and extinguishing fire that might catch in said inflammable matter, or in said trestle, or upon its right of way adjacent thereto, from passing trains or said prairie or forest fires along

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defendant's right of way; that because of said negligence a fire caught in the dry bridge itself, or in the debris beneath it, from prairie or forest fires along defendant's right of way, or from engines passing over the trestle, which fire necessitated plaintiff's leap from the engine and which acts of negligence caused plaintiff's injury. The answer was a general denial, coupled with a plea that negligence on the part of plaintiff contributed to his injury; that the acts of his fellow servants caused it; the assumption of the risks of his employment was plead, and that the injury occurred in the Indian Territory; that in said Territory the common law upon the subject of master and servant and fellow servants was in force at the time, and according to said common law in said Territory the plaintiff was a fellow servant with the trainmen, including the engineer, conductor, and others, and a fellow servant with the section foreman and the sectionmen and inspectors of the track, and under said law defendant was not liable to plaintiff for any acts of said fellow servants. The reply was a general denial of the allegations of the answer, and, further, that if the common law was in force in the Indian Territory (which plaintiff denied) then, under such common law, plaintiff was not a fellow servant with those of defendant's employees whose duty it was to keep and maintain the track, right of way, and trestle of defendant in a reasonably safe condition.

At the close of plaintiff's case, a general demurrer was interposed and overruled, defendant excepting. A special demurrer was then interposed to the charge of negligence in the petition pertaining to the failure to have a watchman, patrolman, or other guard at the trestle. This was sustained. At the close of the whole case, the court instructed the jury, at the request of the defendant, that the charge of negligence in not keeping a watchman, patrolman, or other guard at the trestle had been withdrawn and they could not find for plaintiff on that charge; that if fire was communicated to the trestle from passing engines, then their verdict should be for defendant, and that if it was communicated to the trestle from sparks from burning trees off the right of way blown over on the trestle, then their verdict should be for defendant, and also told the jury that if the fire was communicated to the trestle in any other manner than through inflammable matter on the right of way, they should find for the defendant. By still another of defendant's instructions the issues of fact submitted to the jury were restricted, thus: "Before plaintiff can recover he must prove by a preponderance of the evidence: First, that defendant was negligent in permitting inflammable matter to accumulate upon its right of way in proximity to fires outside of such right of way and in such quantities that such inflammable matter, if any, was likely to catch on fire; and second, that fire was communicated from the fires outside of the right of way to said inflammable matter and extended therefrom to said trestle and caused the burning of the same; third, that the presence of such inflammable material

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upon said right of way, if it so existed, directly caused the injuries, if any, to plaintiff." The learned trial court refused to adopt the views of appellant counsel evidenced in certain instructions offered, one of them a peremptory command to find for appellant, and exceptions were saved. So, too, that court modified certain of appellant's instructions and gave certain instructions for respondent, and exceptions were saved. The correctness of rulings nisi on certain evidence admitted for respondent was duly challenged below and is assigned for error here, as well as the rulings on instructions. The several assignments of error deemed material to be considered, together with those additional facts uncovered at the trial essential to an understanding and determination of the case, will be set forth in the course of this opinion.

1. It is contended by appellant there was no case to go to the jury under the issue as narrowly whittled down by the court. In other words, first, the ground of recovery left standing being the accumulation of inflammable debris negligently on the right of way, there was no evidence tending to show that this negligent accumulation caused the fire in the bridge, hence, respondent had no case; second, that if the fire in the bridge was communicated through a negligent accumulation of inflammable debris, then, the acts of the section men and section foreman in allowing such accumulation were the acts of fellow servants of the trainmen, and on that theory respondent must be cast; and, finally, that the negligence of the engineer, a fellow servant of respondent, was the proximate cause of the injury, and hence, no recovery would lie. Is there substance in either of these contentions, or in the defenses of contributory negligence or assumption of risks? Let us see.

(1) There is no evidence worthy of the name tending to show that respondent himself was negligent. He was an experienced railroad man, it is true, but he was a brakeman, not charged with the duty of running the engine. He jumped when the engine was about two car lengths from the fire. It is not strongly contended by the learned counsel for appellants that respondent was not justified in jumping in the appalling emergency confronting him. True it is, the evidence shows the engine cleared the burning place in the trestle and stopped, and, if respondent had stayed where he was, no hurt would have come to him. His escape, however, was like that of a brand plucked from the burning, or with the smell of fire on his garments; for the four cars of coal next the engine either then, or presently, went through the trestle and one end of the tender went down. We may not be allowed to review this transaction from the standpoint of the way it looks to us, glancing back. We know; he did not know. It must be judged of by the way it would look to a reasonable man before the jump. Being suddenly called upon to consider a question of life and death in the face of a danger imperiously menacing him, he acted on appearances under a

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natural and allowable impulse of self-preservation and the law will not concern itself overclosely in scrutinizing and gauging his judgment, because men facing confusing perils sprung on them quickly are not called on to act with coolness and precision. The impelling question is whether appellant's own skirts are clear of blame for the fire, rather than whether respondent acted with good judgment in escaping its flames, and, in our view, the contributory negligence of respondent may be considered out of the case under the facts presented for adjudication.

(2) So, too, the assumption of risks plead in the answer may be eliminated; because, though it may be said generally a servant assumes the ordinary risks incident to a given employment, yet he does not assume the risk of supervening acts of negligence of the master and it is such alleged supervening acts of negligence that are to be dealt with in this case. It may be said, in passing, that Root was a new man on the road, had been in appellant's employ but a few days, passing over this trestle but six times, usually in the night, and he was not shown to have any knowledge of the conditions about the trestle or on the right of way, and, therefore, we may properly put away the defense of assumption of risks.

(3) But appellant says, the proximate cause of the injury was the negligence of the engineer in running his train too fast and approaching the bridge without caution. On this head it was shown in evidence he was running, say, 23 miles an hour as he came around a curve in view of the trestle. It is shown that as the engine came around said curve, about 1,000 feet from the fire, on a slight down grade, the steam was cut off; and, when the fire was discovered, the emergency air was put on. It was furthermore shown that all the cars, as well as the engine, were equipped with air. A rule was in evidence requiring freight trains to be run at a rate not to exceed 18 miles an hour. On the 8th of July the trainmaster, having in charge the trainmen on that part of the road, issued the following order: "Office of Train Master, Pittsburg, July 8, 1901. Bulletin to Conductors and Engineers: Owing to extreme heat and drought there is a great liability of damage being done by fire. You will be very watchful and proceed cautiously in approaching bridges and obscure places. In case of fire being found on the right of way you will not hesitate to stop and do all in your power to extinguish such fires and use back fires whenever it seems practicable to do so. All fires found on our right of way should be reported to this office by wire from first telegraph station, and give mile post location, stating how far north or south of mile-post. [Signed] Day Mills, Trainmaster." It was also in evidence, and uncontradicted, that a train equipped as this one, on that grade, at a going speed of 18 miles an hour, could be stopped in less than 400 feet, and going at 25 miles an hour, in 500 feet. The most that can be said of this proof is that it tended to show the engineer, a fellow servant of respondent, was running his train

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negligently. The court instructed the jury that if the negligence of the engineer was the sole cause of the injury, respondent could not recover; but the jury were further instructed that if the negligence of the fellow servant united with the negligence of appellant to produce the injury, then respondent could recover. If A. and B. contribute to the injury of C., and if A. is C.'s master and B. a fellow servant, C. may recover against A. *Browning v. Railroad*, 124 Mo. 55, 27 S. W. 644. This is also the law in Arkansas. *Neal v. Railroad*, 71 Ark., loc. cit. 450, 451, 78 S. W. 220.

(4) A general understanding of other facts uncovered at the trial is a necessary preliminary to the consideration of the principal propositions in hand, and those facts, avoiding detail, will now be given. The trestle ran north and south, and was a wooden structure made of bents, stringers, ties, and rails. Each bent was composed of a group of oak piles, 10 to 12 feet above ground, and a foot or more square. Said bents were about 14 feet apart, and the superstructure consisted of said stringers, ties, and rails. The testimony does not agree as to the exact length of this trestle, but it was several hundred feet long. The road at this place ran through a forest and the right of way was 100 feet wide with the roadbed in the center. As said, there was a slough or cut-off, filled with running water in flood times, water that left Poteau river to the west and ran through this slough and back into Poteau river farther east. It was across this slough or draw the trestle was built. A long-continued and searching drought in the summer of 1901 afflicted the region through which appellant's road ran. Fires were occurring and were naturally expected to occur along the line. Logs, dead trees, stumps, brush and even standing brambles and smaller growths had become somewhat combustible. In this prevailing condition of danger, appellant issued through its superintendent to its roadmasters, including P. Sloan, the roadmaster in charge of the track at the place in question, on the 7th day of July, 1901, the following circular order: "Dear Sirs: If you have not already done so, please proceed at once to remove all vegetable matter from under bridges, buildings, piles of material, etc., to prevent damage by fire. Also do everything you can consistently to prevent damage by fire to property adjoining right of way. Also report every case of fire being set along track by sparks dropping from ash pans of engines. Acknowledge receipt. Yours truly, [Signed] W. Coughlan, Superintendent." On the 8th day of July, 1901, Mr. Sloan issued the following circular order: "Spiro, 7-8 '01. Circular No. 26. All Foremen: You will at once remove all vegetable matter from under bridges, buildings, telegraph poles, piles of materials, etc., to prevent damage by fire, and do everything you can consistently to prevent damage by fire to property adjoining right of way. Also report any case of fire being set out along track by sparks dropping from ash pans of engines. Do not set fire to any old trees or timber

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of any kind during dry and hot weather. Acknowledge receipt. P. Sloan, Roadmaster."

One Parsons was the section foreman having in charge section 47, covering the trestle in question, and on a day not precisely located but shown by his weekly "force report" to be within a period covered by the 8th to the 13th of July, inclusive, he, with a force of 10 men, cleaned under that trestle and others and about telegraph poles, in obedience to the order of roadmaster Sloan. The plan adopted at the trestle in question was to clean out the stuff to a distance of three or four feet on each side of the trestle. Respondent called to the stand the section foreman, Parsons, and other employees engaged in this work. By Parsons, on cross-examination, it was shown there was no brush or rubbish or stuff to burn under the trestle before it was cleaned out; that there was nothing but small grass and a few weeds. By another witness, Thornton, who was then a sectionman and was engaged in farming at the time he testified, it was shown that they cleaned out under the trestle "mighty clean and nice." Then the following occurred: "Q. What did you do with the stuff that you cleaned out from under the bridge? A. Part of it we piled up. Piled part of it out where we got through, you know, and part of it we dragged out in a little branch that was there. Barrow pit; part of it was laying in there and part on the bank. Q. Now, about how far from this trestle was this stuff raked out? A. We was supposed to take it about six feet. Q. Not what you were supposed to, but how far did you take it? A. About three or three and a half feet from the trestle. Q. What was the nature of this stuff that you cleaned out from under this bridge? A. It was logs, stumps, and brush, and stuff that had been washed there from the overflows. Q. What was the nature of the stuff you cleaned out from under the trestle as to being wet or dry? A. Why, it was dry."

This witness also testified that there were two dry stumps left standing under the trestle, as we understand the evidence. Other evidence was introduced tending to show that there were dry (and presumably rotten) logs on the right of way, one of them, at least, coming as close as eight feet of the trestle and drift lying about. There was a so-called public road running adjacent to the right of way on the west, and at this immediate time a gang of men, not working for appellant, were cutting a public road to the east of the right of way and immediately adjacent thereto; the object being to drain it into the "barrow pit." It should be said, furthermore, that along the extreme verge of the right of way to the east, as likewise to the west, barrow (or borrow?) pits had been dug, out of which the material had been taken to make fills in the roadbed. We are not concerned about the barrow pit on the west, but the one on the east made a continuous ditch, useful for drainage, and this pit was dry except at the south end of the trestle, where there was a little water. The trestle fire burned to about 42 feet of its south end and seems to

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have been confined to the length of four cars, about 180 feet. Whether or not there was any water in the pit due east of this burnt part of the trestle is not clearly shown, but some of the testimony tended to show it was dry. We take it that the "branch" referred to by the witness Thornton, where some of the combustible rubbish was piled, was this dry barrow pit. The men engaged in cutting out this public road were using fire to burn the brush and whatever down, or cutdown, stuff would burn. During July 15th, and possibly before, a short distance east of the new public road, fires were in the timber among the dead trees. It was in evidence, and uncontradicted, that the men engaged in this road work "chunked up" their log or brush heaps about quitting time and that they were then afire. On July 15th, Parsons, with his gang of sectionmen, was about a mile and a half or two miles south of the trestle and these men were in view of a smoke that was in the neighborhood of the trestle on the east. The wind during the afternoon sat in the northwest, but about sundown, or 7 o'clock, whipped around to the northeast and blew with vehemence for a short time, bringing in its train a slight fall of rain. Three witnesses, a farmer named Smith, and his wife and daughter, gave the most graphic description in the record of the prevailing condition of things at that time. They were returning home from labor in the field and were on the east of the trestle. The northeast wind in a gale was blowing a stream of live coals and rotten chunks ablaze from dead standing trees east of the right of way, and apparently alive with fire from top to bottom, on and across the right of way and over and on the trestle about where it was burnt. So strong was this storm of fire that Smith could not drive between the burning trees and the railroad and, accordingly, had to veer off. They noticed no fire on the right of way nor on the trestle. The last witness passing was a liveryman in a buggy with top up and side curtains down. This was about 9 o'clock p. m. He saw fires to the east, but none on the right of way and none on the trestle. At least two trains passed between 6 o'clock and 12, but there is no evidence indicating that any fire escaped from the ash pans of either engine. In this condition of things about 12:05 o'clock on that night, after the engine of respondent's freight train, as said, came around a curve some distance north of the trestle, a fire was discovered blazing about a foot high above the trestle itself. At that time, or immediately before, respondent saw trees afire to the east of the trestle and possibly off the right of way. Respondent introduced witnesses in the employ of appellant company, who, on cross-examination, made it plain that they came on the scene, one, about two hours, and others, four and five hours after the fire, and some of these witnesses examined and then could discover no trace on the ground that the fire off the right of way to the east had spread continuously to the right of way and over the right of way to the trestle. Moreover there is testimony showing that the coal cars and coal went

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down and burnt and that this latter fire was somewhat wider than the trestle itself. There is other evidence tending to show that the right of way to the east of the burned place in the trestle had at that time been burnt over and that there were burning logs then on the right of way and, as we understand it, all the inflammable stuff on the right of way east of the burnt section of the trestle, save a log or so, had been consumed, or was burning. Appellant introduced evidence tending to show that there was no fire on the right of way east of the trestle at the time of the accident; at least, the witnesses didn't notice any.

We have thus condensed the facts of a long record relevant to the question now in hand, to wit, whether the case was a proper one for the jury (barring for the present any consideration of the theory that the trackmen were fellow servants with the trainmen), and, considering those facts, we announce our conclusion to be that the court did not err in overruling the demurrer to respondent's evidence or in refusing appellant's peremptory instruction at the close of the case. Because: Appellant's contention is that the negligence, if any, in allowing the inflammable debris to accumulate on the right of way is not shown to be the proximate cause of the fire; i. e., that there is no substantial evidence showing the fire was communicated to the trestle through this debris. Appellant suggests that an engine may have dropped coals of fire from its ash pan on the trestle and that this view presents a reasonable cause of the fire's origin. If there were no facts pointing to a more reasonable theory of the fire, then the theory suggested by appellant would be well enough; but in the presence of the other facts pointing to a more reasonable theory of the fire, the engine theory, in our opinion, does not rise to the dignity of more than a conjecture—a possibility when compared with the theory that the fire was communicated through the debris. An engine has an ash pan containing, we will say, hot ashes and live coals. From it coals of fire might escape. The circular letters of Superintendent Coughlin and Roadmaster Sloan show they had in mind this very contingency. Based upon this possibility and upon the passage of two engines between dark and midnight, an airy and ingenious fabric of reasoning is built up that these engines caused this fire. No proof exists that the ash pans of these engines were out of repair or leaked fire; no proof is offered that a coal of fire escaped from such ash pans. One of these engines passed early in the evening. If, to use a homely simile, it had laid an egg in the shape of a live coal, hatching subsequently into a blaze, the presumption would be the engineer or fireman on the second engine passing several hours later would have discovered it and reported it. No such discovery is indicated in the proof, hence, in appellant's hypothesis, the first engine should be eliminated. Its theory, then, must be held to stand or fall upon the passage of the second engine. The trial court permitted that theory to go to the jury, at appellant's request, as a question of fact and the jury weighed it in the balance and found it wanting in the

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presence of other facts pointing with more reasonable certainty to another origin of the fire. With their judgment we rest content.

But appellant says that there is evidence that at dusk of July 15th, fire was in the air blowing over the trestle and, what is more, over that part of the trestle burned. Appellant says the proof shows no fire ran along the ground from fires on the outside of the right of way and left trace on the ground of a communication to the debris on the right of way and thence to the trestle, and that in the absence of such proof there is nothing to go to the jury. Of this contention it may be said that one theory advanced weakens another. For instance, one of appellant's notions is that fire was communicated to the trestle through the air by coals blown directly over the right of way and on the trestle, and hence it should escape liability on the theory of the court's instruction. But if coals of fire were blown through the air on the trestle and thereby, like a serpent on a rock or a bird in its flight, left no trace of passage, then, by the same token fire could have been blown through the air and have rained down on the right of way and on the debris in the window about three feet from the trestle, or on the rotten and dry logs on the right of way, or stumps, or on the rubbish stored in the branch or barrow pit, and this method of communicating a fire could not be shown by a trail on the ground connecting the fire raging to the east of the right of way up to and with the debris on the right of way. Now, the proof shows that coals of fire were raining down on the right of way and on the debris accumulated there, so that if we would allow appellant's contention that a lack of trace on the ground of communicated fire is fatal to a recovery, the same contention militates against its other theory of defense. The truth is the contention is unsound; for with fire raining from the air, why bother with traces on the ground? And while the communication of fire from this debris to the trestle is not proved by eyewitnesses or by direct proof, yet to our minds the transmission of fire in that way to a dry trestle lies above mere possibility and conjecture and comes within the realm of reasonable and natural inference; for, assuming the debris was there, assuming the fire at one time was outside the right of way, assuming the wind took up this fire and whirled it on the right of way in coals and burning chunks, assuming the fire on the trestle was seen some hours afterwards—we say, assuming all these things shown by the proof—then it seems reasonable to conclude, given some wind stirring afterwards, or none at all, that a live coal of this rained-down fire, falling on a rotten log or a mass of chunks or other debris, would naturally catch and smolder in ambush and presently break forth with such fury as to ignite a nearby dry structure, and that all this would be much more reasonable than to conclude that a live coal falling on top of the large, bare, sound timbers of a railroad bridge would smolder and lurk and some hours afterwards break out into a consuming blaze. The one theory furnishes a matrix

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and feed for the fire—the sustained application of igniting heat; and, since flames ascend, it dovetails into the proved fact that the fire was discovered in the top of the bridge. The other theory furnishes no matrix for the fire except solid timber igniting from a live coal.

Speaking of the subject of liability for fires, it has been said (13 Am. & Eng. Enc. of Law [2d Ed.] p. 444): “It is not essential to a recovery that the plaintiff should introduce direct proof of the particular act of negligence which caused the damage complained of. Thus, where the proof did not show whether the fire was communicated first to the dry grass and combustibles on the right of way and thence to the plaintiff’s premises, or directly to the latter without intervening medium, but it was clearly established that the fire originated in the one place or the other in the manner indicated, it was held that the jury were justified in returning a verdict for the plaintiff, without determining decisively where the fire first started.” The general doctrine announced by this textwriter is sustained by the line of argumentation adopted by Henry, J., in *Kenney v. Railroad*, 70 Mo. 243; *Torpey v. Railway Co.*, 64 Mo. App. 382, and other cases that might be cited, though in those cases the question discussed pertained to engines setting out fires. Nevertheless, the reasoning employed fits a case where the issue is between two fires originating, possibly, in different ways. Many cases have been collated by the industrious counsel of appellant in their brief proper and reply, directed to the general proposition formulated by Marshall, J., in *Warner v. Railroad*, 178 Mo., loc. cit. 134, 77 S. W. 70, to the effect that “if the injury may have resulted from one of two causes, for one of which and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action.” See, also, *Reiss v. Steam Co.*, 128 N. Y. 107, 28 N. E. 24; *Grant v. Railroad*, 133 N. Y. 658, 31 N. E. 220; *Railroad v. Victory* (Ky.) 47 S. W. 440; *Gas Co. v. Kaufman* (Ky.) 48 S. W. 434; *Hughes v. Railroad*, 91 Ky. 531, 16 S. W. 275; *Sash, etc., Co. v. Railroad*, 83 Minn. 370, 86 N. W. 451; *Hanrahan v. Brooklyn Elev. R. Co.* (Sup.) 45 N. Y. Supp. 477; *Railroad v. De Graff* (Colo. App.) 29 Pac. 664. But the propositions of law relied on and sustained by appellant’s citations do not apply to the facts of the case at bar. Here, there are facts strongly sustaining the theory that the fire in the trestle was communicated through the accumulation of debris on the right of way. There were other facts rendering it possible that appellant might escape liability on the theory put to the jury that the fire was not communicated through such debris, but was carried from outside fires, directly to the trestle. As said by a very wise and a very just jurist, Caldwell, J. (though in a dissenting opinion)—*Myers v. Railroad*, 95 Fed., loc. cit. 414, 37 C. C. A. 145—“a jury is much more competent to determine these questions than the judges of this court. * * *” To

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the jury, then, the law leaves the matter, and in the presence of facts and inferences about which honest men might differ, the question does not resolve itself into one of law.

(5) The next serious contention of appellant is that the case should have been taken from the jury, because, conceding the negligent accumulation of rubbish on the right of way, and conceding, moreover, that the fire was communicated to the trestle through this debris, yet that appellant's skirts are clean because it issued orders to clean up the right of way in the presence of impending danger from fire, which orders issued from the superintendent to the roadmaster and by him were transmitted to the section foreman, and that the section foreman and his men in negligently carrying out these orders were fellow servants with respondent. To sustain this contention we are referred to the fact in proof that by an act of the federal Congress under date of May 2, 1890 (26 Stat. 94, c. 182, § 31) certain laws of Arkansas were put in force in the Indian Territory and continued in force to the time of the injury. The specific statute referred to is one adopting the common law, reading thus: "Chapter 20. Common Statute Law of England. Sec. 566. The common law of England, so far as same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law made prior to the fourth year of James First (a) [that are applicable to our form of government] of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state, unless altered or repealed by the General Assembly of this state." Mansfield's Digest of Statutes, p. 262, c. 20. Appellant under this head introduced in evidence certain decisions of the Supreme Court of Arkansas construing the common law relating to the negligence of fellow servants. These cases were as follows: Railroad v. Shackelford, 42 Ark. 417; Railroad v. Gaines, 46 Ark. 555; Railroad v. Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173; Fordyce v. Briney, 58 Ark. 206, 24 S. W. 250; Railroad v. Henson, 61 Ark. 302, 32 S. W. 1079. And on the strength of the foregoing cases appellant contends, first, that on the date of the act of Congress putting in force in the Indian Territory the statutes of Arkansas, May 2, 1890, the common law had been construed by the court of that state so that a section foreman or roadmaster was a fellow servant of a brakeman on a freight train, and that there must be read into the act of congress that construction of the common law; and, second, that such construction of the common law is binding upon this court in a suit here for injuries occurring in the Indian Territory.

Attending to these contentions, it may be said that if the action was based on a statute of Arkansas, then, out of comity (barring mere rules of evidence) we should lean to the construction put on that statute by the courts of that state. And further, if the statute to be enforced were our own, but borrowed from Arkan-

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sas, our Legislature would be presumed to have borrowed the statute with the construction placed upon it by the courts of Arkansas. And, furthermore, it seems to be settled law that in a transitory common-law action, where a suit is brought in a state other than where the injury happened, the interpretation of the common law obtaining in the state where the cause of action accrued, the *lex loci*, will govern. *Fogarty v. Transfer Co.*, 180 Mo. 490, 79 S. W. 664; *Lee v. Railroad* (decided by this court in banc and not yet officially reported) 92 S. W. 614; *Sanger v. Flow*, 48 Fed. 152, 1 C. C. A. 56; *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Walsh v. Railroad*, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; *Brewster v. Railroad*, 114 Iowa, 144, 86 N. W. 221, 89 Am. St. Rep. 348; *Helton v. Railroad*, 97 Ala. 275, 12 South. 276; *Alexander v. Railroad*, 48 Ohio St. 623, 30 N. E. 69; *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578, 70 N. W. 146, 36 L. R. A. 134, 66 Am. St. Rep. 397. In *Alexander v. Railroad*, *supra*, Bradbury, J., speaking to the point, said: "If the facts of the parties impose no obligations on the one hand and confer no rights upon the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would have resulted. An act should be judged by the law of the jurisdiction where it was committed; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience; if his conduct according to that law violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights. Nor is it material that the rules of Pennsylvania law that deny relief to plaintiff in error result from the adjudications of the courts of that state, instead of being legislative enactments, the rules of law established by judicial decisions, are as binding as legislative enactments, until modified, or overturned by other decisions or legislative enactments binding within that jurisdiction. In theory it may be true that there is no common law of Ohio, or of Pennsylvania; that the common law is one and the same in every state acknowledging its obligations, and that the decisions of one state are but evidence of it, not binding upon the courts of any other state; but, as a matter of fact, we knew that in the application of the rules of the common law to the affairs of men, there is, unfortunately, in the several states a wide divergence; and that it necessarily follows that acts and transactions, sufficient in one state to create a cause of action, will not produce that result in another, and in the administration of justice mere theory must be made to yield to the truth as established by facts and experience."

The gist of the matter is that if a litigant has no cause of action in the courts of the state in which he was injured, he has none elsewhere. As a matter of abstract reasoning, much might be said on the other side; because the force of the federal statute

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was spent in adopting an Arkansas statute, itself merely adopting the common law. The common law is a common heritage; i. e., it is our law, and why should we not adopt our own construction of our own law? The writer of this opinion sympathizes with that view; otherwise, in passing on the common law, we might speak with two voices and make "confusion worse confounded," for it is practically conceded by appellant that our own construction of the common law is to the effect that a section foreman or roadmaster, or even a sectionman, charged with the duty of providing a reasonably safe place for trainmen, a reasonably safe field of operations, to wit, safe bridges, rails, ties, and roadbed, are not fellow servants with trainmen whose duty it is to operate trains, but stand as vice principals to trainmen. It would serve no useful purpose to enter the maze of the labyrinth of judicial discussion and adjudication on this question (see *Grattis v. Railroad*, *infra*) but we think the proposition announced above is sustained by the following cases: *Parker v. Railroad*, 109 Mo. 362, 19 S. W. 1119, 18 L. R. A. 802; *Relyea v. Railway Co.*, 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; *Schlereth v. Railway Co.*, 115 Mo. 87, 21 S. W. 1110; *Swadley v. Railway Co.*, 118 Mo. 268, 24 S. W. 140; *Burdick v. Railway Co.*, 123 Mo. 221, 27 S. W. 543, 26 L. R. A. 384, 45 Am. St. Rep. 528; *Grattis v. Railway Co.*, 153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721; *Jones v. Railway Co.*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; 12 Am. & Eng. Ency. (2d Ed.) 1005, 1006, and notes.

Conceding, *arguendo*, that we should adopt the construction placed upon the common law by Arkansas courts in defining fellow servants, yet a close analysis of the Arkansas cases cited leads us to conclude that the Supreme Court of Arkansas never went so far as appellants contends. The very most that can be said was that that learned court was "heading" in that direction. But as seen by our own decisions, and pointed out in *Grattis v. Railway Co.*, *supra*, courts do not always go on the way they are headed, and it is not always safe to say that a court will reach a goal to which its face is turned and its steps directed. Indeed, we may allow to the Supreme Court of Arkansas the same right and disposition to establish a growth in the law or reconstruct its views that we arrogate to ourselves. Before that court reached the point appellant contends it had reached in principle, if it ever would have got there, the Legislature of Arkansas in 1893 (Acts Ark. 1893, p. 68) passed a statute defining fellow servants, which, with variations, this state has adopted. Rev. St. 1899, § 2874 et seq. Let us examine the Arkansas cases relied on by appellant. In *Railroad v. Shackelford* it was held that a laborer on a construction train was a fellow servant with the engineer on the same train. In *Railroad v. Gaines* a brakeman and a car inspector were held to be fellow servants. In *Railroad v. Rice* it was held that a yard inspector and a yard foreman, both under control of a yardmaster, were fellow servants. In this case the distinction was drawn between

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“chief inspectors” and mere yard inspectors, and it was held that the company would be liable for the negligent default of its chief inspectors. But that court did not yield its assent to the doctrine “that every yard inspector on the line of a railroad is a vice principal.” In *Fordyce v. Briney* it was held that a car inspector and a car repairer are fellow servants, where both are under the control and supervision of a foreman who had charge of the business of the company. In *Railroad v. Henson* it was held that a bridge foreman and locomotive engineer are fellow servants. But it must be said of that case that the facts in judgment showed the bridge foreman was hurt while moving with his men on the train run by the engineer. It seems that the bridge gang lived in boarding cars constantly on the move and being pulled over the road by engineers on the various trains. The case proceeded on the theory that the bridge foreman assumed the risk because he knew the manner and method of moving these trains. In that case the injury was caused by a collision.

Some of the foregoing cases would have probably been decided by this court precisely the same as they were by the Supreme Court of Arkansas—in fact, while the reasoning employed by the judges of this court on kindred questions may approach the subject-matter from a different standpoint and differ somewhat from reasons employed by our learned brothers of the Supreme Court of Arkansas, yet, it may be, all of the cases would have been decided the same way by this court at one time or another in its existence. At least, we are not willing to decide that the Supreme Court of Arkansas would have held, judged from its prior decisions, that the roadmaster, Sloan, would not represent the appellant corporation when, as shown by the evidence, on the 13th of July he passed on a tour of inspection over the road, inspected the manner in which the debris had been handled about the trestle in question, from a moving train, presumably saw the condition of the right of way and stamped it with his approval. This court would have certainly held that Sloan’s eyes, as well as the eyes of Parsons, the section foreman, were the eyes of the master and their judgment was the master’s judgment, and it would be but a mere guess for us to say that the Supreme Court of Arkansas would not have said the same thing; because in *Railroad v. Barry*, 58 Ark., loc. cit. 204, 23 S. W. 1007, 25 L. R. A. 386, the Supreme Court of that state used the following language and quoted approvingly the following authorities: “It seems impossible to formulate any general rule for all cases. Each case must, to some extent, be governed by the peculiar circumstances attending it. In *Baltimore & Ohio Railroad Co. v. McKenzie*, it was held that, under the circumstances of that case, a section boss and night watchman, represented the company, the court saying: ‘Where the injuries are caused by the negligence of a servant, who is charged with the performance of duties which, by law, it is incumbent on the master to perform, such servant is regarded as the representative of the master; and in legal contemplation his negligence

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is the negligence of the master.' 81 Va. 71. Judge Cooley says: 'The master is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally, or in respect of the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal as to render the principal so far chargeable for his negligence as for personal fault.' Cooley, Torts, 564." In our opinion, the case at bar was entitled to go to the jury on any theory of the law.

2. Complaint is made of the introduction of incompetent testimony, and it is contended by appellant that the court below committed prejudicial error in that behalf.

(1) For instance, respondent, under an assurance of counsel, made ore tenus, that the same condition of things would be shown to continue down to the date of the injury, was permitted, over the objection of appellant that it was too remote, to show that in the April preceding large quantities of driftwood floated on to the right of way and lodged against the trestle. In making this assurance, counsel were betrayed by their zeal in the hot foot of the trial; because they either would not or could not fulfill it, inasmuch as no such testimony was forthcoming. Was the introduction of this testimony prejudicial error? We think so. Because: The amount of the inflammable debris on the right of way, and especially in the rows within three or four feet of the trestle, was a material element in determining the negligence of appellant and, what is more, in determining whether that negligence caused the fire in the trestle. The issue was the condition of the right of way at the time of the injury and the testimony should have been directed and confined to that issue. It is true that other testimony of respondent was directed to the issue and it may be the jury had evidence upon which, with nice circumspection, they could have determined whether the amount of inflammable stuff there on July 16th would likely have caused the trestle to catch fire, but how can we say they were not influenced by the remote unconnected testimony objected to? If the human mind were so automatically self-adjusting as to forget improper testimony and retain and apply only the proper proof, no injury might have resulted, but unfortunately it is not so. Here was a sharp issue on a vital question, with unfair testimony put in the balance, and who can say it had no effect in the result? In *Smith v. Sedalia*, 182 Mo., loc. cit. 9, 10, 81 S. W. 167, in an identical instance of a broken or forgotten promise, Valliant, J., said: "Upon that assurance [the assurance of counsel to connect the remote testimony] the objection to the evidence was overruled. But the promised evidence was not adduced. The learned trial judge was justified in admitting the evidence on the promise given, and he was also justified in sustaining the motion for a new trial on the ground that the defendant was unable to fulfill its promise. It is in the discretion of the trial court to allow counsel some choice as to the order in which they will introduce their evidence, but when counsel have been permitted to intro-

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duce evidence out of its usual order on their assurances that it will be connected and its relevancy shown later, if the promised evidence is not brought forward and if the irrelevant evidence is of a character likely to influence the jury and if the verdict is on that side, the trial court should set it aside and grant a new trial. The fact that the promise may have been made in good faith does not alter the effect of the illegal evidence." For other cases in point, see the brief of the learned counsel for appellant.

(2) In this case, the motion for a new trial was overruled and in our opinion the trial court erred in that ruling. And this is so in spite of the insistence of respondent that appellant should have renewed its attack by a motion to strike out. Appellant was not in fault, why should it ask a second time for what was denied it at first, because of a promise of respondent broken thereafter? It was respondent who did the mischief, who tolled the court into error, and it was he who thence onward carried the burden of undoing the wrong and who must bear the blame. Not only is the foregoing error in the case, but respondent was permitted to introduce testimony over the objection of appellant tending to show that when the right of way was originally cut through the timber, years before, the logs, etc., were thrown back and to some extent left on the right of way. This testimony tended to show a condition of things not even attempted to be connected on down with conditions prevailing at the time of the fire. In fact, the debris struck at by the petition was described therein as driftwood "carried down said creek at high-water periods," and the proof was outside the specifications in the petition, made with unnecessary particularity, but nevertheless made and constituting the case appellant had to meet.

(3) In taking his depositions, respondent caused to be put to a medical witness this question: "Q. If the testimony in this case showed that on the 16th day of July, the plaintiff was in good health when serving in the capacity of head brakeman on a standard guage freight train upon a dark night that he leaped from the locomotive engine, when upon a trestle, the distance of from 10 to 25 feet, into the bottom of a dry creek, and that as he made the leap he was struck across the back in the vicinity of the lumbar region by some timber, scantling, or other railroad iron, whether in your opinion, such a strike and such a fall would be sufficient to produce the injured condition in which you found Mr. Root to be?" The question was objected to at the trial because it did not correctly state the facts in evidence from respondent and his witnesses, and the objection being overruled, appellant excepted, and the question was answered in the affirmative. The objection should have been sustained. A hypothetical question should be predicated on the testimony and this one was not. *Russ v. Railroad*, 112 Mo., loc. cit. 48, 20 S. W. 472, 18 L. R. A. 823 and cases cited.

3. Appellant complains of the ruling of the court on instructions and this complaint has substance in our opinion. Appellant challenges the correctness of respondent's instruction No. 7 as

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a rule of law. That instruction reads: "You are instructed that it was the duty of the defendant to exercise ordinary care to keep its right of way free from dry and combustible matter which would be liable to take fire and communicate to the trestle, and this duty is a personal duty of the defendant, is absolute in its nature, and cannot be delegated or entrusted to any of its agents, employees or servants so as to release itself from liability to the plaintiff for injuries sustained by him in consequence of the failure of any such agent, servant, or employee to perform such duty, but upon the other hand when the authority is delegated or entrusted by the defendant to any such agent, servant, or employee, the negligent acts or omissions of such agent, servant, or employee becomes the negligence or omission of the defendant itself." One criticism hinges on the phrase "liable to take fire," and it is insisted the word "liable" is a word of such wide play in meaning as to admit of a gloss rendering its meaning as "within the range of possibility," and so this court held in *Beasley v. Linehan Tr. Co.*, 148 Mo., loc. cit. 421, 50 S. W. 87, in speaking of it when used in a petition. Substituting that meaning, we have an instruction telling the jury that the law imposed upon appellant the duty of keeping its entire right of way free from dry and combustible matter which, within the range of possibility, would take fire and communicate to the trestle, etc., and, so read, its error is so imprinted on its face that one who runs may read it there. This instruction should have told the jury that it was the duty of appellant to use ordinary care to keep its right of way free from such accumulations of combustible matter in such proximity to its trestle as would be subject to, or would probably, or would likely communicate fire thereto. Conceding the word "liable" may shade off in some of its uses into probably or likely, yet other meanings are also attached to it, and its use was unfortunate, for no man can say what meaning was given to it by the jury. A. walks in the field in a rain. He is liable to be struck by lightning. B. rides in a boat. He is liable to be drowned. C. eats fish. He is liable to have a bone stick in his throat. All these are allowable expressions, and yet neither A., B., nor C. is necessarily negligent in walking in the field, rowing on the river, or in eating fish.

The duty of the master is performed in supplying a reasonably safe field of operations, a reasonably safe place. *Jones v. Railroad*, 178 Mo., loc. cit. 544, 77 S. W. 890, 101 Am. St. Rep. 434. Accumulations of inflammable matter on its right of way so close to a dry trestle and in such amounts as to endanger it by fire igniting the matter and thereby burning the trestle is negligence, and the court should have so directed the jury in substance. Instead of so doing the instruction in hand went beyond the rule regulating the duty of the master. Leaving combustible material on the right of way is not negligence per se. Its extent and its proximity to the track may be such as to justly subject appellant to the imputation of negligence and of this the jury are the judges, and not the court. *Railroad Co. v. Dennis*, 38 Kan.,

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loc. cit. 426, 17 Pac. 153; *White v. Railroad Co.*, 31 Kan., loc. cit. 280, 1 Pac. 611, and cases cited; *Taylor v. Railroad (Pa.)* 34 Atl. 457; *Railway v. Bailey (Ind. App.)* 46 N. E. 689; *Railway Co. v. Sparks (Tex. Civ. App.)* 35 S. W. 745.

Other assignments of error in refusing and modifying instructions seem to us without merit as applied to the facts in judgment. Otherwise than as stated, the cause was well tried.

The judgment is reversed, and the cause remanded to be proceeded with in accordance with this opinion.

BRACE, P. J., and VALLIANT, J., concur. MARSHALL, J., concurs in the result.

NOTE.

**SERVANT INJURED THROUGH COMBINED NEGLIGENCE
OF MASTER AND FELLOW SERVANT—
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Injury to Servant from Concurring Negligence of His Master and Fellow Servant—Liability of Master.—See foot-notes appended to *Chicago Union Traction Co. v. Sawusch (Ill.)*, 18 R. R. R. 856, 41 Am. & Eng. R. Cas., N. S., 856; foot-notes appended to *Gordon v. Chicago, etc., Ry. Co. (Iowa)*, 18 R. R. R. 646, 41 Am. & Eng. R. Cas., N. S., 646.

Note

I. IN GENERAL.

A. GENERAL RULE.

If the negligence of the master, or of one of his employees for whose negligence he is responsible, and that of a fellow servant of the injured employee, both contribute in causing injury to a servant, the fault of the fellow servant is no defense to an action against the master to recover for the injury.

United States.—*Anderson v. The Ashebrooke* (C. C. A.), 44 Fed. Rep. 124; *Boden v. Demwolf*, 56 Fed. Rep. 846; *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. Rep. 125, 6 C. C. A. 281, 16 U. S. App. 17; *Clyde v. Richmond, etc., R. Co.*, 59 Fed. Rep. 394; *Crew v. St. Louis, K. & N. W. Ry. Co.* (C. C. A.), 20 Fed. Rep. 87; *Deserant v. Cerillos Coal Railroad Co.*, 178 U. S. 409, 20 Sup. Ct. Rep. 967; *Farmers' L. & T. Co. v. Toledo, etc., R. Co.*, 67 Fed. Rep. 881; *Finley v. Richmond, etc., R. Co.*, 59 Fed. Rep. 419; *Felton v. Harbeson* (C. C. A.), 104 Fed. Rep. 737; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Cudahy Packing Co. v. Anthes* (C. C. A.), 117 Fed. Rep. 118; *Killien v. Hyde*, 63 Fed. Rep. 172; *Little Rock, etc., R. Co. v. Barry*, 84 Fed. Rep. 944; *McMahon v. Henning* (C. C. A.), 3 Fed. Rep. 353, 1 McCrary 516; *Maupin v. Texas, etc., R. Co.* (C. C. A.), 99 Fed. Rep. 49; *Mexican Cent. R. Co. v. Glover* (C. C. A.), 107 Fed. Rep. 356; *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep. 723; *Northern Pac. R. Co. v. Charless*, 51 Fed. Rep. 562, 2 C. C. A. 380, 7 U. S. App. 359; *Northern Pac. R. Co. v. Poirier*, 67 Fed. Rep. 881; *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915, 12 U. S. App. 688; *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932, 5 C. C. A. 326, 17 U. S. App. 22; *Shugart v. Atlanta, etc., R. Co.* (C. C. A.), 133 Fed. Rep. 505; *Smith v. Memphis & L. R. R. Co.* (C. C. A.), 18 Fed. Rep. 304; *Terre Haute, etc., R. Co. v. Mansberger*, 65 Fed. Rep. 196; *The Phoenix*, 34 Fed. Rep. 760; *Union Pac. Ry. Co. v. Callaghan*, 56 Fed. 988, 6 C. C. A. 205, 12 U. S. App. 541; *Walker v. Grand Trunk Ry. Co.*, Fed. Cas. No. 17,070, affirmed in *Grand Trunk Ry. Co. v. Walker*, 154 U. S. 653, 14 Sup. Ct. Rep. 1189; *Young v. New Jersey & N. Y. R. Co.*, 46 Fed. Rep. 160.

Arizona.—*Gila Valley, etc., Ry. Co. v. Lyon*, 16 R. R. R. 745, 39 Am. & Eng. R. Cas., N. S., 745, 80 Pac. 337.

Arkansas.—*Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250; *Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445.

California.—*Fisk v. Central Pac. R. Co.*, 72 Cal. 38, 13 Pac. 144; *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256; *Kevern v. Providence Gold & Silver Min. Co.*, 70 Cal. 392, 11 Pac. 740; *Trewatha v. Buchanan Gold Min. & Mill. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561.

Colorado.—*Denver, etc., R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093.

Connecticut.—*Farrell v. Eastern Machinery Co.*, 77 Conn. 484.

Delaware.—*Wheatley v. Philadelphia, W. & B. R. Co.*, 1 Marv. (Del.), 305, 30 Atl. 660.

District of Columbia.—*McDade v. Washington, etc., R. Co.*, 5 Mackey 144, 26 Am. & Eng. R. Cas., 325.

Georgia.—*Burns v. Ocean S. S. Co.*, 84 Ga. 709, 11 S. E. 493; *Cheaney v. Ocean S. S. Co.*, 92 Ga. 726, 19 S. E. 33; *Collev v. Southern Cotton Oil Co.*, 120 Ga. 258, 47 S. E. 932; *Jackson v. Merchants', etc., Transp. Co.*, 118 Ga. 651, 44 S. E. 834; *Ocean S. S. Co. v. Matthews*, 86 Ga. 418, 12 S. E. 632; *Southern Bauxite Mining & Mfg. Co. v. Fuller*, 116 Ga. 695, 43 S. E. 64.

Illinois.—*Armour v. Golkowska*, 202 Ill. 144; *Chicago, etc., R. Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657; *Chicago, etc., R. Co. v. House*, 172 Ill. 601, 50 N. E. 151; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. App. 492; *Chicago, etc., Coal Co. v. Moran*, 210 Ill. 9; *Chicago, etc., R. Co. v. Wise*, 206 Ill. 453; *Girard Coal Co. v. Wiggins*, 52 Ill. App. 69; *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 414; *Illinois, etc., R. Co. v. Johnson*, 95 Ill. App. 54; *Monmouth Min. & Mfg. Co. v. Erling*, 148 Ill. 521, 36 N. E. 117; *Norris v. Illinois Cent. R. Co.*, 88 Ill. App.

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Indiana.—*Boyce v. Fitzpatrick*, 80 Ind. 526; *Cincinnati, I., St. L. & C. Ry. Co. v. Lang*, 118 Ind. 579, 21 N. E. 317; *Hancock v. Keene*, 5 Ind. App. 408, 32 N. E. 329; *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158; *Louisville, N., A. & C. Ry. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3; *Louisville, etc., R. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988; *Louisville, E. & St. L. Consol. R. Co. v. Miller*, 140 Ind. 685, 40 N. E. 116; *New York, etc., R. Co. v. Perriguet*, 138 Ind. 414, 34 N. E. 233; *Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246; *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 38 N. E. 67; *Pennsylvania Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210.

Iowa.—*Beresford v. American Coal Co.*, 124 Iowa 224; *Gordon v. Chicago, etc., Ry. Co. (Iowa)*, 18 R. R. R. 646, 41 Am. & Eng. R. Cas., N. S., 646, 106 N. W. 177.

Kansas.—*Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149, 11 Am. & Eng. R. Cas. 206; *Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343; *Schwarzschild v. Drysdale*, 69 Kan. 119, 76 Pac. 441.

Kentucky.—*Linck v. Louisville, etc., R. Co.*, 170 Ky. 370, 54 S. W. 184.

Louisiana.—*Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363; *McGinn v. McCormick*, 109 La. 396; *Stucke v. Orleans R. Co.*, 50 La. Ann. 172, 23 So. 342; *Towns v. Vicksburg, etc., R. Co.*, 37 La. Ann. 630.

Massachusetts.—*Cayzer v. Taylor*, 76 Mass. 274; *Cooper v. Hamilton Mfg. Co.*, 96 Mass. 193; *Drommie v. Hogan*, 153 Mass. 29, 26 N. E. 237; *Elmer v. Locke*, 135 Mass. 575; *Gilman v. Eastern R. Corp.*, 10 Allen (Mass.) 233; *Griffin v. Boston, etc., R. Co.*, 148 Mass. 143, 19 N. E. 166; *Fallon v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631; *Hayes v. Western R. Corp.*, 57 Mass. 270; *King v. Boston, etc., R. Corp.*, 9 Cush. (Mass.) 112; *Lawless v. Connecticut River R. Co.*, 136 Mass. 1, 18 Am. & Eng. R. Cas. 96; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631; *Sullivan v. Wamsutta Mills*, 155 Mass. 200, 29 N. E. 516.

Michigan.—*Anderson v. Michigan Cent. R. Co.*, 107 Mich. 591, 65 N. W. 585; *Hays v. Sterns*, 130 Mich. 287; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502, 41 Am. & Eng. R. Cas. 452; *Town v. Michigan Cent. R. Co.*, 84 Mich. 214, 47 N. W. 665.

Minnesota.—*Delude v. St. Paul City Ry. Co.*, 55 Minn. 63, 56 N. W. 461; *Franklin v. Winona & St. P. R. Co.*, 37 Minn. 409, 34 N. W. 898; *McMahon v. Davidson*, 12 Minn. 357; *Ransier v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 331, 20 N. W. 332; *Swanson v. Oakes*, 93 Minn. 404.

Mississippi.—*Bradford v. Taylor*, 85 Miss. 409; *Memphis, etc., R. Co. v. Thomas*, 51 Miss. 637; *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258.

Missouri.—*Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 18 S. W. 1103; *Browning v. Wabash Western Ry. Co.*, 124 Mo. 55, 27 S. W. 644; *Cole v. St. Louis Transit Co.*, 183 Mo. 81; *DeWesse v. Meramec Iron Min. Co.*, 128 Mo. 423, 31 S. W. 110; *Ellingson v. Chicago & A. R. Co.*, 60 Mo. App. 679; *Stoher v. St. Louis, I. M. & S. Ry. Co.*, 105 Mo. 192, 16 S. W. 591; *Henry v. St. Louis, etc., R. Co.*, 76 Mo. 288, 12 Am. & Eng. R. Cas. 136; *Henry v. Wabash W. R. Co.*, 109 Mo. 488, 19 S. W. 239; *Hogue v. Sligo Furnace Co.*, 62 Mo. App. 491; *Irmer v. St. Louis Brewing Co.*, 69 Mo. App. 17; *Relyea v. Kansas City, etc., R. Co. (Mo.)*, 19 S. W. 1116; *Steffen v. Mayer*, 96 Mo. 420, 9 S. W. 630; *Young v. Shickle, Harrison & Howard Iron Co.*, 103 Mo. 324, 15 S. W. 771.

Montana.—*Schmidt v. Montana Cent. Ry. Co.*, 15 Mont. 106, 38 Pac. 226.

New Hampshire.—*Scrois v. Henry (N. H.)*, 59 Atl. 936.

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New Jersey.—*Cole v. Warren Mfg. Co.*, 63 N. J. L. 626, 44 Atl. 647; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151.

New Mexico.—*Lutz v. Atlantic, etc., R. Co.*, 6 N. Mex. 496, 30 Pac. 912.

New York.—*Abel v. Delaware & H. Canal Co.*, 128 N. Y. 662, 28 N. E. 663; *Anthony v. Leeret*, 105 N. Y. 591, 12 N. E. 561; *Bagley v. Consolidated Gas Co. (N. Y. Com. Pl.)*, 13 Misc. Rep. 6, 34 N. Y. Supp. 187; *Bennett v. Long Island R. Co.*, 21 N. Y. App. Div. 25; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449; *Booth v. Boston, etc., R. Co.*, 73 N. Y. 38; *Bryant v. New York Cent., etc., R. Co.*, 81 Hun 164; *Busch v. Buffalo Creek R. Co.*, 29 Hun 112; *Cone v. Delaware, etc., R. Co.*, 81 N. Y. 206; *Connors v. Elmira, C. & N. R. Co.*, 92 Hun 339, 36 N. Y. Supp. 926; *Coppins v. New York Cent. & H. R. R. Co.*, 48 Hun 292, affirmed in 122 N. Y. 557, 25 N. E. 915, 44 Am. & Eng. R. Cas. 618; *Crowell v. Thomas*, 90 Hun 193, 35 N. Y. Supp. 936; *Ellis v. New York, L. E. & W. R. Co.*, 95 N. Y. 546, 17 Am. & Eng. R. Cas. 641; *De Young v. Irving*, 5 App. Div. 499, 38 N. Y. Supp. 1089; *Dwyer v. Hickler (Super. Ct. Buff.)*, 16 N. Y. Supp. 814; *Donohue v. Brooklyn City R. Co. (City Ct. Brook.)*, 14 N. Y. Supp. 639, 131 N. Y. 623, 30 N. E. 865; *Harvey v. New York Cent. & H. R. R. Co.*, 88 N. Y. 481, 8 Am. & Eng. R. Cas. 515; *Hollingsworth v. Long Island R. Co.*, 91 Hun 641, 36 N. Y. Supp. 1126; *Kern v. De Castro & Donner Sugar Refining Co. (City Ct. Brook.)*, 5 N. Y. Supp. 548 (but see 125 N. Y. 50, 25 N. E. 1071); *Lilly v. New York Cent. & H. R. R. Co.*, 107 N. Y. 566, 14 N. E. 503; *Mulvaney v. Brooklyn City R. Co. (City Ct. Brook.)*, 1 Misc. Rep. 425, 21 N. Y. Supp. 427; *O'Donnell v. East River Gas Co.*, 91 Hun 184, 36 N. Y. Supp. 288; *Pullutro v. Delaware, L. & W. R. Co.*, 27 N. Y. S. R. 63, 7 N. Y. Supp. 510; *Smith v. New York Cent. & H. R. R. Co.*, 9 N. Y. St. Rep. 612; *Strauss v. New York, etc., R. Co.*, 91 N. Y. App. Div. 583; *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575; *Sutter v. New York Cent., etc., R. Co.*, 79 N. Y. App. Div. 362; *Sweeney v. New York, N. H., etc., R. Co.*, 32 N. Y. S. R. 416; *Warn v. New York Cent. & H. R. R. Co.*, 80 Hun 71, 29 N. Y. Supp. 897; *Whittaker v. Delaware, etc., Canal Co.*, 126 N. Y. 544, 27 N. E. 1042; *Wood v. New York Cent., etc., R. Co.*, 32 N. Y. App. Div. 606.

North Carolina.—*Bean v. Western North Carolina R. Co.*, 107 N. Car. 731, 12 S. E. 600; *Crutchfield v. Richmond & D. R. Co.*, 76 N. Car. 320; *Troxler v. Southern R. Co.*, 122 N. Car. 902, 30 S. E. 117.

North Dakota.—*Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128, 49 N. W. 655.

Ohio.—*Cincinnati Ice Co. v. Higdon (Super. Ct. Cin.)*, 2 W. L. B. 3, 7 O. Dec. (Reprint) 239; *Lake Shore, etc., R. Co. v. Feller*, 21 O. C. C. 605, 11 O. C. D. 799; *Lake Erie, etc., R. Co. v. Mulcahy*, 16 O. C. C. 204, 9 O. C. D. 82; *Pittsburg, C. & St. L. Ry. Co. v. Henderson*, 37 O. St. 549; *Smith v. Powell*, 23 W. L. B. 436, 10 O. Dec. Reprint 799.

Oregon.—*Carlson v. Oregon Short Line & U. N. Ry. Co.*, 21 Ore. 450, 28 Pac. 497; *Hartvig v. N. P. Lumber Co.*, 19 Ore. 522, 25 Pac. 358; *Knahtla v. Oregon Short Line, etc., Ry. Co.*, 21 Ore. 136, 27 Pac. 91.

Pennsylvania.—*Cannon v. Mears (Pa. Com. Pl.)*, 7 Kulp, 281; *Kaiser v. Flaccus*, 138 Pa. St. 332, 22 Atl. 88; *Philadelphia Iron, etc., Co. v. Davis*, 111 Pa. St. 597, 4 Atl. 513.

South Carolina.—*Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302, 44 S. E. 943, 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95.

Tennessee.—*Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 23 S. W. 211; *Louisville & N. R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. 326; *Nashville, C. & St. L. Ry. Co. v. Handman*, 81 Tenn. 423; *Russel v. Dayton Coal, etc., Co.*, 109 Tenn. 49.

Texas.—*Bonn v. Galveston, etc., R. Co. (Tex. Civ. App.)*, 81 S. W. 808; *Galveston, etc., R. Co. v. Sherwood (Tex. Civ. App.)*, 67 S. W.

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776, 4 R. R. R. 564, 27 Am. & Eng. R. Cas., N. S., 564; Galveston, H. & S. A. Ry. Co. *v.* Sweeney, 14 Tex. Civ. App. 216, 36 S. W. 800; Galveston, H. & S. A. Ry. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066; Gulf, C. & S. F. Ry. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667; Gulf, C. & S. F. Ry. Co. *v.* Kizziah, 86 Tex. 81, 23 S. W. 578; Gulf, C. & S. F. Ry. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151, 1 R. R. R. 831, 24 Am. & Eng. R. Cas., N. S., 831; Gulf, etc., R. Co. *v.* Pettis, 69 Tex. 689; Gulf, C. & S. F. Ry. Co. *v.* Warner (Tex. Civ. App.), 36 S. W. 118; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800; Houston, etc., R. Co. *v.* Lowe (Tex.), 11 S. W. 1065; International, etc., R. Co. *v.* Bonatz (Tex. Civ. App.), 48 S. W. 767; International & G. N. Ry. Co. *v.* Hall, 78 Tex. 657, 15 S. W. 108; International & G. N. R. Co. *v.* Williams (Tex. Civ. App.), 34 S. W. 161, 3 R. R. R. 778, 26 Am. & Eng. R. Cas., N. S., 778; International, etc., R. Co. *v.* Zapp (Tex. Civ. App.), 49 S. W. 673; Louisiana, etc., R. Co. *v.* Carstens (Tex. Civ. App.), 47 S. W. 36, 12 Am. & Eng. R. Cas., N. S., 781; Mexican Nat. R. Co. *v.* Mussette, 86 Tex. 708, 26 S. W. 1075; Missouri, etc., R. Co. *v.* Ferch (Tex. Civ. App.), 44 S. W. 317; Missouri, etc., R. Co. *v.* Hanning, 20 Tex. Civ. App. 649, 49 S. W. 116; Missouri, K. & T. R. Co. *v.* Woods (Tex. Civ. App.), 25 S. W. 741; Ray *v.* Pecos, etc., R. Co. (Tex. Civ. App.), 80 S. W. 112; San Antonio & A. P. Ry. Co. *v.* Harding, 11 Tex. Civ. App. 497, 33 S. W. 373; St. Louis & S. F. Ry. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789; Texas, etc., R. Co. *v.* Eberhart (Tex. Civ. App.), 40 S. W. 1060; Texas & P. Ry. Co. *v.* Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942; Texas, etc., R. Co. *v.* Lee, 32 Tex. Civ. App. 23; Texas Cent. R. Co. *v.* Pelfrey, 35 Tex. Civ. App. 501; Texas & P. Ry. Co. *v.* Scott, 64 Tex. 549; Trinity, etc., R. Co. *v.* Brown (Tex. Civ. App.), 46 S. W. 926.

Utah.—Hicks *v.* Southern Pac. R. Co., 27 Utah 526, 12 R. R. R. 332, 35 Am. & Eng. R. Cas., N. S., 332, 76 Pac. 625; Wright *v.* Southern Pac. Co., 14 Utah 383, 5 Am. & Eng. R. Cas., N. S., 559, 46 Pac. 374.

Vermont.—Morrisey *v.* Hughes, 65 Vt. 553, 27 Atl. 205.

Virginia.—Baltimore & O. R. Co. *v.* McKenzie, 81 Va. 71; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496; Norfolk & W. R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342; Norfolk & W. R. Co. *v.* Phelps, 90 Va. 665, 19 S. E. 652; Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 368, 41 S. E. 726; Norfolk & W. R. Co. *v.* Thomas, 90 Va. 205, 17 S. E. 884; Richmond, etc., R. Co. *v.* George, 88 Va. 223, 13 S. E. 429; Richmond, etc., R. Co. *v.* Tribble, 97 Va. 495, 24 S. E. 278; Virginia, etc., R. Co. *v.* Bailey, 103 Va. 205, 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795, 49 S. E. 33.

Washington.—Howe *v.* Northern Pac. R. Co., 30 Wash. 569, 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624, 70 Pac. 1100.

West Virginia.—Berns *v.* Gaston Gas Coal Co., 27 W. Va. 305.

Wisconsin.—Atkinson *v.* Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764; Cowan *v.* Chicago, M. & St. P. Ry. Co., 80 Wis. 284, 50 N. W. 180; Fowler *v.* Chicago, etc., R. Co., 61 Wis. 159, 21 N. W. 40; Grant *v.* Keystone Lumber Co., 119 Wis. 229; Johnson *v.* First Nat. Bank, 79 Wis. 414, 48 N. W. 712; Jones *v.* Florence Min. Co., 66 Wis. 268, 28 N. W. 207; Schultz *v.* Chicago, etc., R. Co., 48 Wis. 375, 4 N. W. 399; Sherman *v.* Menominee River Lumber Co., 72 Wis. 122, 39 N. W. 365; Stetler *v.* Chicago, etc., R. Co., 49 Wis. 609, 6 N. W. 303; Stetler *v.* Chicago & N. W. Ry. Co., 46 Wis. 497, 1 N. W. 112.

B. OTHER STATEMENTS OF GENERAL RULE.

In *Grand Trunk Ry. v. Cummings*, 106 U. S. 700, L. Ed. 266, Mr. Chief Justice Waite said: "The principle is universal that, when the negligence of the principal, and that of a fellow servant together produce injury, the principal is liable therefor."

In *Kansas City, etc., R. Co. v. Becker*, 63 Ark. 477, 16 Am. &

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Eng. R. Cas., N. S., 348, 39 S. W. 358, it is held, that where an employee's injury is the result of the concurring negligence of a fellow servant and the master, the master is liable.

In *Rogers v. Leyden*, 127 Ind. 53, 26 N. E. 210, it is held, that an employer must answer for his own breach of duty to his servant, even though the latter's fellow servants were also guilty of negligence which contributed to the wrong done to the injured employee.

A servant may recover of his master for injuries owing to his negligence co-operating with that of a fellow servant. So held in *Gordon v. Chicago, etc., Ry. Co. (Iowa)*, 18 R. R. R. 646, 41 Am. & Eng. R. Cas., N. S., 646, 106 N. W. 177.

Where an injury to an employee results from the common negligence of his master and fellow servant, the fellow-servant doctrine does not absolve the master from liability. So held in *Fuller v. Tremont Lumber Co. (La.)*, 17 R. R. R. 710, 40 Am. & Eng. R. Cas., N. S., 710, 38 So. 164.

In *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 41 Am. & Eng. R. Cas. 452, 44 N. W. 502, it was held, that where an employer has been guilty of negligence, causing an injury to one of his servants, the fact that the negligence of a fellow servant contributed to cause the injury will not bar a recovery.

Where the negligence of the master combines with that of a fellow servant, so as to contribute to the injury of another servant, the master is liable. So held in *Delude v. St. Paul City Ry. Co.*, 55 Minn. 63, 56 N. W. 461.

There may be a recovery against the master for injury to a servant resulting from the joint negligence of the master and a fellow servant of the injured employee. So held in *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 18 S. W. 1103.

In *Deweese v. Meramec Iron Mining Co.*, 128 Mo. 423, 31 S. W. 110, it is held, that the negligence of a fellow servant must have been the whole cause of the injury to be a good defense, in an action against the master for injuries to his employees.

The employer is liable for an injury to an employee from the concurrent negligence of the master and fellow servants. So held in *Hicks v. Southern Pac. R. Co.*, 27 Utah 526, 12 R. R. R. 332, 35 Am. & Eng. R. Cas., N. S., 332, 76 Pac. 625.

Where the negligence of the employer and that of a fellow servant combine to produce an injury to a servant, the employer will be liable in damages to the injured servant. So held in *Wright v. Southern Pac. Co.*, 14 Utah 383, 5 Am. & Eng. R. Cas., N. S., 559, 46 Pac. 374.

In *Howe v. Northern Ry. Co.*, 30 Wash. 569, 70 Pac. 1100, 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624, it is held, that the negligence of a fellow servant concurring with the negligence of the master does not excuse the primary negligence of the master for injury to another servant.

In *Bodie v. Charleston, etc., Ry. Co.*, 66 S. Car. 302, 44 S. E. 943, 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95, it is held, that if an employee is injured by an accident resulting from the concurrent negligence of a fellow servant and of his railroad company, the company is liable, as though it was the sole offender.

Where the negligence of his fellow servant contributed to cause an injury to another employee, whether such negligence arose out of the violation of the rules of the master or otherwise, it is not a defense to an action against the master, if there was concurring negligence on the part of the master. So held in *Galveston, H. & S. A. Ry. Co. v. Sweeney*, 14 Tex. Civ. App. 216, 36 S. W. 800.

In *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226, it is held, that if an employee is injured through the failure of his master to perform any nonassignable duty, and such negligence proximately contributed to the injury, it is no defense for the master that the negligence of a coemployee also contributed to cause the injury.

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If an injury to a servant is caused in part by the negligence of a fellow servant, yet the negligence of the vice principal contributed to the injury, the master is liable. So held in *Chicago Union Traction Co. v. Sawusch* (Ill.), 18 R. R. R. 856, 41 Am. & Eng. R. Cas., N. S., 856, 75 N. E. 797.

A master is responsible to his servant for an injury caused by the negligence of a vice principal and the concurrent negligence of such employee's fellow servant. So held in *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915, 12 U. S. App. 688.

The master is liable for injury to his servant proximately caused by the concurring negligence of his foreman and the injured employee's fellow servant. So held in *Missouri, etc., Ry. Co. v. Hanning* (Tex. Civ. App.), 49 S. W. 116.

Fellow Servant's Negligence Merely Contributory.—The fact that his fellow-servant's negligence merely contributed to the injury to a railroad employee does not relieve the company from liability, if its own negligence or that of its employees who were not fellow servants of the injured employee also contributed to it. So held in *San Antonio & A. P. Ry. Co. v. Harding*, 11 Tex. Civ. App. 497, 33 S. W. 373.

C. ILLUSTRATIONS OF GENERAL RULE.

1. Unsafe Place to Work.

In an action against the master, for injury to his servant, caused partly by the negligence of a fellow servant, and partly by the failure of the master to provide a reasonably safe place at which to work, the negligence of the fellow servant will not exonerate the master. So held in *Stucke v. Orleans R. Co.*, 50 La. Ann. 172, 23 So. 342.

If injury to an employee was caused by the negligence of his employer in requiring him to work in a dangerous place, the fact that the negligence of his fellow servant contributed to the accident is no defense in an action against the master. So held in *Johnson v. First Nat. Bank of Ashland*, 79 Wis. 414, 48 N. W. 712.

Where injury to a servant was caused by the master's requiring him to work in a place which the master was chargeable with notice was unsafe, the fact that negligence of a fellow servant contributed to the injury will not prevent recovery against the master. So held in *Hancock v. Keene*, 5 Ind. App. 408, 32 N. E. 329.

Work Place Unsafe Through Fellow Servant's Negligence.—In *Southern Bauxite Mining & Mfg. Co v. Fuller*, 116 Ga. 695, 43 S. E. 64, it is held, that a master is liable for injuries to his servant caused by a failure to provide him a reasonably safe place to work, even though such failure may have been due to the negligence of the injured employee's fellow servant.

Unsafe Mine Roof and Failure of Fellow Servant to See to Its Safety.—Where a person employed by a mining company to lay down a track in a mine is injured by reason of failure of his employer to keep the mine roof in a safe condition, it is no defense that a fellow servant was also negligent in seeing to the safety of the roof. So held in *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158.

Death of Minor—Defective Ventilation and Fellow-Servant's Negligence in Going into Gaseous Chamber with Open Lamp.—In *Russel v. Dayton Coal & Iron Co.*, 109 Tenn. 43, it is held, that where the negligence of the master in failing to comply with the requirements of the statute with respect to the ventilation of his mine concurs with negligence of a fellow servant in going into a gaseous chamber with an open lamp, in producing an explosion, whereby another servant is killed, the fellow-servant's negligence is no defense, in an action against the master for the death.

Unguarded and Unlighted Guy in Street Struck by Wagon—Fall of Employee.—An employee of defendant was working, at night, on

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timbers supported by guys in the street. The guys, through defendant's negligence, were not guarded or lighted, as was customary and necessary, and a wagon struck one, causing him to fall from the timbers. It was held, that the fact that the guys were placed by fellow servants, and their negligence may have contributed to the injury, was no defense. So held in *Kenedy v. Grace & Hyde Co.* (C. C. A.), 92 Fed. Rep. 116.

Death of City Fireman—Defect in Highway and Negligence of Fellow-Servant in Driving.—In *Brabon v. Seattle*, 29 Wash. 6, it is held, that where the death of a fireman was the result of the overturning of a hose cart on which he was riding, by reason of its striking the root of a tree projecting into a highway, which it was the duty of the defendant city to keep in a proper condition, the fact that the driver of the hose cart was also negligent will not prevent recovery against defendant, unless his negligence was the sole cause of the accident.

Injury to Brakeman—Fall of Trestle.—In *Elmer v. Lock*, 135 Mass. 575, 15 Am. & Eng. R. Cas. 300, it was held, that a brakeman may maintain an action against his company for personal injuries occasioned, while he was in the exercise of due care, by the fall of a trestle work supporting a portion of a spur track, which was intended for use for an indefinite period of time, if the fall was partly caused by defective construction of the trestle work, and partly by the negligence of the fellow servants of the plaintiff.

Insufficiently Lighted Passageway—Hatchway Left Open by Fellow Servant.—Where the negligence of the master, in insufficiently lighting a passageway, concurs with that of plaintiff's fellow servant, in leaving a hatchway in the floor open, in injuring another servant, the negligence of the fellow servant is no defense in an action against the master. So held in *Schwarzschild v. Drysdale*, 69 Kan. 119, 76 Pac. 441.

Use of Defective Planks in Staging—Suitable Material Furnished.—Negligence in furnishing two defective planks used in the construction of a staging, will render the master liable for injury to a laborer assisting defendant's superintendent in installing an elevator, where the injury was the result of such use of the planks, although in the lumber supplied there was ample material suitable for constructing the staging, and the intervening negligence of the superintendent, even if that of a fellow servant, in failing to observe and reject the defective planks when he built the staging, could not relieve defendant from responsibility. So held in *Farrell v. Eastern Machinery Co.*, 77 Conn. 484.

Fall of Staging—Suitable Materials Furnished and Erection Intrusted to Skillful Workmen—Supervision.—But in *Peschel v. Chicago, M. & St. Paul Ry. Co.*, 62 Wis. 338, 21 N. W. 269, it is said in the opinion: "So, for example, where the master undertakes to build a staging, or have it built under his direct personal supervision, he is liable for any defect or insufficiency in the structure which due care on his part would have avoided or made good. This is the principle which rules *Arkenson v. Dennison*, Supra (117 Mass. 407); *Behm v. Armour*, 58 Wis. 1, 15 N. W. 806, and *Manning v. Hogan*, 78 N. Y. 615. These cases affirm the doctrine, if the master has charge of the work himself, he is guilty of negligence if defective appliances are furnished or the structure is built in an unsafe manner, though he had employed competent and suitable men to do the work. But where the master retains no supervision over the erection of the staging, gives no directions in regard to it, but provides suitable materials therefor, and intrusts the duty of its erection to skillful workmen, he is not liable to one of the workmen for injuries resulting from the falling of the staging, though it was insufficiently built. *Kelley v. Norcross*, 121 Mass. 508; *Colton v. Richards*, 123 Mass. 484; *Killea v. Faxon*, 125 Mass. 485; *Armour v. Hahn*, 111 U. S. 313. The negligence in such a case is that of a fellow servant, for which the master is not liable."

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Construction of Sewer—Failure of Competent Foreman to Sufficiently Brace—Proper Materials Furnished.—And in *Dwyer v. Hickler* (Supr. Ct. of Buffalo), 16 N. Y. Supp. 814, it appeared that an employee of defendant while he was engaged in the construction of a sewer, dumping into the trench brick and mortar to be used by the bricklayers, was injured by reason of the giving way of soil from the side of the trench, owing to insufficient bracing. It appeared that the foreman of the "bracing gang," whose duty it was to protect the sides of the trench, was competent, and that sufficient and proper materials had been furnished for doing the work. It was held, that the injury was caused by negligence of fellow servant, and not by that of the master, though he had recently passed along the sewer to see that work was properly done. In this case it is said in the opinion: "The cause of the accident, therefore, does not rest upon any failure of defendant to provide a safe place for plaintiff to perform his labor. On the contrary, it is the result of a failure of competent servants to make use of proper materials, furnished by defendants, to make the trench safe. But this is the negligence, not of defendants, but of the coservants, and for that defendants are not liable." Citing *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905.

Defective Scaffold—Skillful Workmen and Suitable Material.—So in *Benn v. Null*, 65 Iowa 407, 21 N. W. 700, an action by a carpenter against his employer for injuries received by falling from a defective scaffold, it appeared that the scaffold was erected by a fellow servant, defendant not being present. And there was no evidence that defendant was negligent in the employment of unskillful workmen or in failing to furnish suitable materials with which to erect the scaffold. It was held, that there could be no recovery.

2. Defective Machinery or Appliances.

In *Griffin v. Boston, etc., R. Co.*, 148 Mass. 143, 19 N. E. 166, it is said in the opinion: "There is no doubt as a general rule a master is bound to exercise reasonable care in providing suitable machinery, instruments, means, and appliances for his work. It is also well settled, that if he has failed to do so, and an injury has resulted to his servant, the master is responsible, although the negligence of a fellow servant contributed to the accident." Citing *Cayzer v. Taylor*, 10 Gray 274; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38; *Cone v. Delaware, etc., R.*, 81 N. Y. 206, 2 Am. & Eng. R. Cas. 57; *Grand Trunk Ry. v. Cummings*, 106 U. S. 700, 11 Am. & Eng. R. Cas. 254, 1 Sup. Ct. Rep. 493.

The negligence of a fellow servant will not relieve the master from liability arising concurrently from unsuitable machinery furnished, or from machinery operated by servants ignorant of the latent dangers in handling such machinery. So held in *Gulf, etc., R. Co. v. Kizziah*, 86 Tex. 81, 23 S. W. 578.

Where an injury to a servant is attributable partly to his fellow-servant's negligence and partly to the negligent failure of the master to provide proper appliances, the fellow-servant's negligence will not exonerate the master. So held in *Towns v. Vicksburg, etc., R. Co.*, 37 La. Ann. 630.

The negligence of a servant in using defective and unsafe machinery, delivered to him for use by the master, does not relieve the master from responsibility to a fellow servant injured thereby on account of the unsafe condition of the machinery furnished. So held in *Ransier v. Minneapolis & St. Louis Ry. Co.*, 32 Minn. 331, 20 N. W. 332.

Failure to Supply Suitable Ladder and Negligence in Constructing and Adjusting Ladder.—Where negligence of a fellow servant, in constructing and adjusting a ladder, concurred with the negligence

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of the master, in failing to supply a suitable ladder, in causing injury to another servant, the fellow-servant's negligence will not relieve the master from responsibility. So held in *Ralph v. American Bridge Co.*, 30 Wash. 500.

Unsafe Rope and Negligence in Operating Elevator.—Where a servant is injured by reason of negligence of the master in furnishing an unsafe rope for an elevator, the negligence of a fellow servant in operating the elevator is no defense in an action against the master. So held in *Cudahy Packing Co. v. Anthes (C. C. A.)*, 117 Fed. Rep. 118.

Failure to Furnish Means for Repairing and Negligence in Operating Machine.—In *Monmouth Mining & Mfg. Co. v. Erling*, 148 Ill. 521, 36 N. E. 117, it is held, that where a servant was injured by the operation of machinery which was rendered dangerous by the loss of nuts by which to control the action of the machine, and it was negligently operated by a fellow servant, the negligence of the master in not providing means for repairing the machinery will warrant a recovery against the master, in an action for the injury, in the absence of contributory negligence on the part of the injured employee.

Fall of Weight—Death of Pile-driver Workman—Absence of "Chock"—Negligence in Operation of Engine or Operation of Ropes.—In action for injuries causing the death of defendant's employee, while he was at work upon a modern pile-driver, if it appears that the negligence of his fellow servants, either in the operation of the engine or the adjustment of the ropes to the pile, or the hoisting of the same, combined with the negligence of the master in not providing the means of protection afforded by the "chock," an appliance to prevent the fall of a heavy piece of iron, the negligence of the fellow servants is no defense. So held in *Swanson v. Oakes*, 93 Minn. 404.

Injury Caused by Defective Machine.—In *Young v. New Jersey & N. Y. R. Co.*, 46 Fed. Rep. 160, it is held, that the master is liable for an injury to a servant caused by a defective machine, even though the negligence of a fellow servant contributed to the accident.

Unsafe Elevator and Negligence of Elevator Man.—Where an employee of defendant was caught by the door of an elevator, which suddenly closed as he was attempting to enter elevator, if the accident was the concurrent result of the negligence of the elevator man in removing his foot from the button in the floor of the car, and that of defendant in using an unsafe elevator, defendant was liable, even though the injured employee and the elevator man were fellow servants. So held in *Auld v. Manhattan Life Ins. Co.*, 34 N. Y. App. Div. 491.

Injury to Miner—Cage Lowered against Projecting Automatic "Chair"—Failure of Cage Rider to See That Chair Was in Good Order.—In *Jenkins v. Mammoth Mining Co.*, 24 Utah 513, 68 Pac. 845, an action by a miner for injuries resulting from the cage in which he was being lowered into the mine coming into contact with certain chairs projecting into the shaft, which chairs were used to steady the cage when it stopped at a level, and which, when in proper order, automatically fell back out of the way when the cage was lifted from off them, it appeared that it was the duty of the "cage rider" who managed the cage to make a trip before taking miners into the mine, in order to see that the chairs were in order, but that on the occasion in question he failed to perform such duty, and that the chairs had been out of order for some months, so that they would not automatically drop back. It was held, that if the injury was the result of a defect in the chair and the failure of a fellow servant to see that it was in proper condition, the master was liable.

Defect in Machinery Caused by Negligence of Another Employee.—In *McDade v. Washington & Georgetown R. Co.*, 5 Mackey

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(D. C.) 144, 26 Am. & Eng. R. Cas. 325, it is held, that an employee who is charged with working machinery with another employee is not a fellow servant, in such a sense as to discharge the master from responsibility for any injury to one of them which happens through a defect in the machinery, although that defect may have been brought about by the negligence of the other employee.

Selection of Defective Appliance for Jacking Up Car.—In *Williams v. New York, etc., R. Co.*, 21 N. Y. Supp. 259, it is held, that where two employees are engaged in jacking up a car, the common master can not avoid liability for an injury to one of them, caused by the other getting for use a defective jack, though the selection was made without the aid of the injured employee.

Defective Steam Hammer and Negligence of Fellow Servant—Reasonable Care Exercised in Procuring Sound Machinery and Faithful and Competent Employees.—But in *Hanrathy v. Northern Cent. Ry. Co.*, 46 Md. 280, it is held, that the master is not liable to a servant for injuries caused by the defective condition of a steam hammer of his master, or by reason of such defect and the negligence of his fellow servants combined, unless the master did not use reasonable care in procuring for its work sound machinery, and faithful and competent employees.

Defect in Machinery Caused by Incompetency or Negligence of Fellow Servants.—And in *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411, it is held, that where the defect complained of in machinery furnished a servant to operate was the consequence of the incompetency or neglect of the injured employee's fellow servant, the master is not liable, where it appears he had not been negligent either in selecting the fellow servant or in providing the machinery.

Defective Machinery Negligently Used for Wrong Purpose.—And if injury is caused to a servant by the negligence of his fellow servant, in using defective machinery for purposes and in a manner for which it was not designed, and the machinery would have been safe if properly used in work for which it was designed, the master is not liable. So held in *Texas & P. Ry. Co. v. Scott*, 64 Tex. 549.

Unsuitable Machinery Selected for Use by Fellow Servants.—And where a contractor has provided suitable and safe machinery for the use of his employees, and such machinery is on hand and can be used, and any of such employees, through negligence or error of judgment, select and use machinery of insufficient size and strength, and an injury results therefrom to a fellow servant, the contractor is not liable if the employees were competent and careful persons. So held in *Harms v. Sullivan*, 1 Ill. App. 251.

Fellow Servant's Selection for Use of Cars without Brakes When Cars with Brakes Were Available.—So in *Maryland Clay Co. v. Goodnow*, 95 Md. 330, it is held, that where a servant is injured by reason of the negligence of his fellow servants in using cars without brakes, when cars with brakes were at hand and available for use, there can be no recovery against the master.

Injury to Repair Shop Mechanic—Explosion of Locomotive Boiler—Negligence of Fellow Servants in Inspecting.—And in *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146, 9 Am. & Eng. R. Cas. 510, an action for alleged negligence causing the death of a mechanic employed in defendant's repair shop, it appeared that, by the rules of the shop, known to all the employees, when a locomotive was sent to the shops for repairs, besides repairing the defects reported, a thorough examination was required to be made to discover and repair other defects, if any; that the ordinary course of business was to put the locomotive into the hands of the boiler-makers for examination and repairs, then into the hands of machinists, and finally it was turned over to mechanics to set the safety-valve; that this last work was usually committed to deceased and another; that while they were setting the safety-valve of a locomotive, which had passed through this course, the boiler exploded and he was killed:

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that the explosion was caused, as the evidence tended to show, by defects in the boiler, which should have been discovered by the boiler-makers; and that those employed in the shop were skillful mechanics, and had reported to the master-mechanic that the locomotive was "all right." It was held that a nonsuit was proper, as the death was caused by the negligence of his fellow servants, and that the case was not within the principle holding the master responsible for unsafe machinery furnished for the use of the employee, as the locomotive was not placed in his hands for use.

3. Defective Cars or Engines.

Defective Cars and Negligence of Fellow Servant.—A railroad will not be relieved of liability to a servant resulting from its negligent failure to perform the duty of maintaining the good condition of its cars, by reason of the fact that the negligence of another servant, a fellow servant of the injured man, has concurred in producing the injury. So held in *Galveston, etc., R. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066.

Rear-end Collision between Handcars—Defective Spring and Negligence of Fellow Servant in Following Other Handcar Too Closely, with Knowledge of Defect.—Where, in consequence of a defective spring upon a hand-car furnished by a railroad company to a section gang, the man in charge of the car was unable to prevent it from running into another car, which had been stopped somewhat suddenly by an obstruction on the track, and a man upon the other car was injured without negligence on his part, it is not a good defense for the company, as against the right of recovery of the man so injured, that the foreman of the colliding car, even assuming him to have been the fellow servant of the other, knew of the defect in the spring, and was guilty of negligence in following the other car too closely, or in not observing as quickly as he should that it was slowing down, as the accident would be the result of the combined negligence of the company and the foreman. So held in *McGinn v. McCormick*, 109 La. 396, 33 So. 382.

Defective Brake-rod—Placed in Dangerous Position Through Negligence of Fellow Servant.—Where the master has been negligent in using a car with a defective brake-rod, by reason of which a servant was injured, the fact that it was through the negligence of a fellow servant that such employee was placed in a position to receive injury through the defective brake-rod, was no defense in an action against the master. So held in *Cowan v. Chicago, M. & St. P. R. Co.*, 80 Wis. 284, 50 N. W. 180.

Death of Engineer—Failure to See That Headlight Was in Proper Condition and Negligence of Fellow Servant.—Where negligence in failing to see that the headlight on an engine was in proper condition contributed in causing the death of an engineer, his employer can not escape liability by reason of the fact that the negligence of deceased's fellow servants also contributed to his death. So held in *San Antonio & A. P. Ry. Co. v. Harding*, 11 Tex. Civ. App. 497, 33 S. W. 373.

Defective Couplings.—In *McMahon v. Henning, McCrary* (C. C.) 516, plaintiff sued for injuries received while coupling cars. He alleged that the defendant was guilty of negligence in using defective cars with dangerous coupling apparatus. Defendant contended that the injury was the result of the negligence of a coemployee, but it was held that the company was liable: the negligence of the fellow servant not relieving the company from liability.

Defective Bumper Beam.—A railroad company may be liable for injury to its employee from defects in a bumper beam, although the negligence of his fellow servant concurred in causing the accident. So held in *International & G. N. R. Co. v. Zapp* (Tex. Civ. App.), 49 S. W. 673.

Defective Drawheads and Negligence of Fellow Brakeman.—In

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Troxler v. Southern R. Co., 122 N. Car. 902, 30 S. E. 117, it appeared that plaintiff, a brakeman, while attempting to couple two freight cars of unequal height, whose drawheads were skeletons and one of them was so open that the link would not go in except in a standing direction, which made it necessary for him to put in his hand and reach over the deadlocks in order to make the coupling, had his hand crushed; and that the negligence of his fellow brakeman contributed to the accident. It was held that the negligence of the master in furnishing defective and dangerous drawheads rendered it liable.

Absence of Bumpers and Negligence of Fellow Servant.—Where a laborer upon a gravel train had his leg crushed between two cars, while he was swinging between them for the purpose of boarding a train, as required by the course of his employment, and the cause of the accident was negligence in failing to have appliances to prevent their coming into immediate contact, the concurring negligence of a fellow servant is no defense in an action against the master. So held in *Pullutro v. Delaware, L. & W. R. Co.* (Supr. Ct. of Buffalo), 7 N. Y. Supp. 510.

Overlapping Buffers and Negligence in Making Up Train.—In *Ellis v. New York, L. E. & W. R. Co.*, 95 N. Y. 546, 17 Am. & Eng. R. Cas. 641, the action was for the death of a brakeman, killed in a collision by being crushed between two cars furnished with buffers which overlapped each other, and which were useless. The defendant contended that the negligence, if any, was that of the person making up the train, who was the fellow servant of the deceased. But the court held that this was no defense, saying: "This rule (the fellow-servant rule) has no application if the company has at the same time disregarded its obligation to provide either a suitable roadbed, or engines, cars, or other necessary appointments of the railroad, so that the injury is not entirely caused by the negligence of the fellow servant, but is in part, at least, the result of that omission of duty. In such a case, the negligence of the coservant will not exonerate the company from the consequences of its own default.

Collision between Sections of Train—Defect in Drawbar and Negligence of Fellow Servant in Stopping Forward Section.—In *Chicago & N. W. Ry. Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657, it appeared that a brakeman, on discovering that his train has broken in two, signaled the engineer to go ahead and boarded the rear section to set brakes, in obedience to the company's rules, and was knocked from the train by a collision between the two sections. It was held that he could recover against the railroad where the cause of the break was a defect in a drawbar which might have been discovered by inspection, even though his fellow servant, the engineer, contributed to the injury by stopping the forward section.

Death of Car-coupler—Drawbars of Unequal Heights—Violation of Federal Statute—Cars Pushed Together with Unusual Force.—In *Neal v. St. Louis, I. A. & S. Ry. Co.*, 71 Ark. 445, it is held, that if the death of a brakeman is partly caused by failure of the master to comply with the act of Congress requiring use of cars with drawbars of standard and uniform heights, the fact that the negligence of his fellow servants, in pushing cars against the other cars with great and unusual force also contributed to the accident, would be no defense in an action against the company.

Mismatched Bumpers and Excessive Speed.—Where a brakeman, while making a coupling, is injured by reason of the bumpers on the engine being so low as to pass under the bumpers on a car, the master is not relieved from liability by the negligence of the person in charge of the engine in moving it faster than is usual in such cases. So held in *Donohue v. Brooklyn City R. Co.* (City Ct. of Brook.), 14 N. Y. Supp. 639, affirmed in 131 N. Y. 623, 30 N. E. 865.

Drawbar Too Low—Directing Coupling to Be Made.—Where a

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brakeman is injured while making a coupling, by reason of the drawbar on a locomotive being too low for its purpose, in an action against the company it is no defense that the conductor, or any persons in charge of the cars at the time, directed the coupling of such locomotive. So held in *Lawless v. Connecticut River R. Co.*, 136 Mass. 1, 18 Am. & Eng. R. Cas. 96.

Injury to Engine Wiper—Movement of Defective Engine.—In *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149, 11 Am. & Eng. R. Cas. 206, the injured employee was an engine wiper, and was injured in consequence of the engine moving upon his hand, while he was beneath it. It was shown that the engine was defective and dangerous. The defendant contended that no recovery could be had, because the person in charge of the engine might have prevented the injury, which was therefore attributable to the negligence of a coemployee. It was held, however, that plaintiff was entitled to recover, the court saying: "The argument of counsel is not sound, because if the negligence of the master or employer combines with the negligence of a fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master."

Negligent Management of Defective Engine.—In *Crutchfield v. Richmond, etc., R. Co.*, 76 N. Car. 320, the railroad company was held liable to one of its employees for injuries received through the negligent management by another employee of a defective and unsuitable engine furnished by the company.

Failure to Furnish Sufficient Brakes and Failure of Flagman to Give "Slow" Signal.—Where injury to a fireman is the concurrent result of the negligence of the master in failing to have sufficient brakes on its train and that of a flagman, the fireman's fellow servant, in failing to give a "slow" signal, the negligence of the latter is no defense in an action against the master. So held in *Galveston, etc., Ry. Co. v. Jackson* (Tex. Civ. App.), 44 S. W. 1072.

4. Negligence with Respect to Railroad Track or Roadbed.

In *Donohue v. Brooklyn City R. Co.*, 38 N. Y. S. R. 485, 14 N. Y. Supp. 639, it is held that the fellow-servant rule does not apply where a railroad company has failed to provide a suitable roadbed, engine, cars, or other necessary appliances, so that the injury to an employee is not entirely caused by the negligence of a fellow servant, but is the result, in part, of the negligence of the master.

Failure to Provide Switch Target and Negligence of Engineer.—Where during the construction of a railroad, negligence in not providing a target upon a switch was the cause of a construction train running into an open switch upon a siding, and thereby injuring defendant's employee, the fact that the negligence of the engineer of the train, the injured employee's fellow servant, contributed to the accident was no defense in an action against the railroad. So held in *Bennett v. Long Island R. Co.*, 21 N. Y. App. Div. 25.

Unprotected Switch Track and Negligence in Handling Train.—In *Pennsylvania R. Co. v. Jones* (C. C. A.), 123 Fed. Rep. 753, 9 R. R. 111, 32 Am. & Eng. R. Cas., N. S., 111, it is held, that where a brakeman was killed by the backing of a car in the night from the end of a switch track, which was left unprotected through the negligence of the railroad company, the fact that the negligence of a fellow servant in handling the train also contributed to the accident does not relieve the railroad company from liability.

Defect in Track and Excessive Speed.—Where a switchman, while riding on a locomotive in the discharge of his duties, is injured by reason of a defect in the track and the negligence of the engineer, his fellow servant, in running the locomotive at excessive speed, the master is liable. So held in *Smith v. Memphis & L. R. Co.*, 18 Fed. Rep. 304.

Defective Track—Excessive Speed of Backing Train.—In *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, 1 N. W. 112, it appeared

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that the injury to a fireman was caused by the engine being thrown from the track, owing to the giving way of the rails at a place where the ties were defective and rotten, and where there was a short rail in the track. The defendant tried to escape liability on the ground that the act of plaintiff's coemployees in backing the train at excessive speed had a direct tendency to cause the accident. But the court held that the company was liable for its negligence directly contributing to the injury, although it also appeared that the negligence of a coemployee contributed to the injury.

Obstruction on Track and Negligence in Running Train.—Where the negligence of a railroad in allowing sand to accumulate on its track contributed to an accident to its employee, it could not escape liability on account of the concurring negligence of his fellow servant in running the train over such point at a reckless rate of speed. So held in *Trinity & S. Ry. Co. v. Brown* (Tex. Civ. App.), 46 S. W. 926.

Employee on Car Platform Jostled by Fellow Servant—Switch Stand Too Near Track.—Where an employee, while riding on the platform of one of defendant's cars, which position he was compelled to assume, through no fault of his own, was injured through the combined negligence of the defendant in placing a switch stand too near the track, and the negligence of his fellow servants, who jostled and crowded him, causing him to project his head beyond the side of the car, it was held that the master was liable. *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128, 49 N. W. 655.

Dangerous Proximity of Main Track to Side Track—Negligence of Fellow Servant in Moving Cars.—If a railroad employee is injured by reason of the company's negligence in so constructing its tracks and side tracks, that cars on the main track cannot pass cars on the side track without endangering employees charged with the duty of moving such cars, it is no defense that those whose acts brought the cars into such dangerous proximity were fellow servants of the injured employee. So held in *Pennsylvania Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27.

Brakeman Knocked from Car Step by Train—Tracks Too Near Together at Curve—Negligence in Running Train.—Where a railroad was negligent in laying its tracks so close together that trains could not pass each other in safety in rounding a curve, and one of its brakemen, while trying to force an intoxicated passenger off a car step and into the car was knocked off the step by a train moving in the opposite direction, the negligence of the engineer, his fellow servant, in running the train will not prevent recovery against the railroad for the brakeman's injuries. So held in *Mulvaney v. Brooklyn City R. Co.* (City Ct. of Brook.), 21 N. Y. Supp. 426.

Defective Trestle—Engineer's Violation of Order.—In *Paulmier v. Erie R. Co.*, 5 Vroom (N. J.), 151, it was held that where the track of a railroad company over a trestlework is not capable of supporting an engine, and the engineer in charge had orders not to put his train thereon, which orders he disobeyed, and plaintiff's intestate, who was a fireman on such engine, unaware of such orders and of the danger, was thereby killed, owing to the trestle giving way, the plaintiff was entitled to recover, on the ground that the death was occasioned in part by the want of care in defendant with respect to such trestle work; and the fact that the injury was partially brought about by the negligence of a fellow servant, did not relieve the company from liability.

Defective Roadbed and Failure of Engineer to Obey Signal.—If an injury to a brakeman is partly attributable to a defective roadbed, the fact that the negligence of the engineer in failing to obey a signal, also contributed to the accident is no defense in an action against the railroad. So held in *Missouri, K. & T. Ry. Co. v. Woods* (Tex. Civ. App.), 25 S. W. 741.

Collision with Wagon at Crossing—Failure to Lower Gate and Failure of Fellow Servants to Give Signals.—In *Chicago & A. R. Co.*

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v. Wise, 206 Ill. 453, 69 N. E. 500, 10 R. R. R. 8, 33 Am. & Eng. R. Cas., N. S., 8, it is held that where a foreman of a switching crew was injured because of the combined negligence of the railroad company's gate keeper at a street crossing, in failing to lower a gate, and of the engineer and fireman in charge of an engine on which the foreman was riding at the time of the accident, in failing to give crossing signals, the company was liable, as the foreman and the gate keeper were not fellow servants, though the foreman, engineer, and fireman were fellow servants.

Fall of Brakeman into Uncovered Space between Ties—Fellow Servant's Knowledge of Defects.—In *Franklin v. Winona & St. Peter. R. Co.*, 37 Minn. 409, 31 Am. & Eng. R. Cas., N. S., 211, 34 N. W. 898, the court applied the principle that if negligence of a master combines with the negligence of a fellow servant, and the two contribute to cause the injury of another servant, the master is liable, to a case where a brakeman was killed by falling into an uncovered space between the ties of the defendant's track while making a coupling, and the defendant contended that the conductor, and engineer of the train, knew of the location of the culvert into which the brakeman fell, and therefore their attempt to have the coupling made at that place, was the negligence of the brakeman's fellow servant, for which defendant was not liable.

Defective Rail and Failure of Fellow Servant to Repair.—Where a brakeman was injured by reason of an abrupt depression in one of the rails of his company's track, it is no defense, in an action against the master, that the immediate cause of the accident was the neglect of his fellow servants charged with the duty to keep the track in repair. So held in *Anderson v. Michigan Cent. R. Co.*, 107 Mich. 591, 65 N. W. 585.

Defective Track—Failure of Fellow Servant to Repair.—In *Missouri Pac. R. Co. v. James* (Tex.), 10 S. W. 332, it is held that where a railroad employee is injured by reason of a defective track, it is no defense, in an action against the railroad that his fellow servant had neglected to repair the track as he had been directed to do.

Death of Brakeman—Failure of Fellow Servant to Repair Crossing.—In an action for the death of a brakeman alleged to have been caused by the defective condition of the planking between the rails at defendant's yard, at a highway crossing where he was coupling cars, it appeared that defendant had from the accident sufficient notice of the defect to charge it with negligence in not repairing the planks. It was held that it was immaterial whether the failure to repair was the negligence of a fellow servant. *Fluhrer v. Lake Shore & N. S. Ry. Co.* (Mich.), 17 Am. & Eng. R. Cas., N. S., 463.

Track Rendered Dangerous by Fellow Servant—Failure to Use Ordinary Care to Discover and Remedy Defect.—The negligence of a servant which rendered the railroad track dangerous, and thereby injured his fellow servant, does not relieve the company from liability for its failure to use ordinary care to discover and remedy the defect. So held in *Texas & P. Ry. Co. v. Hohn*, 1 Tex. Civ. App. 36, 21 S. W. 942.

5. Negligence with Respect to Working Force.

Negligence in Running Train and Insufficient Number of Brakemen.—In *Booth v. Boston & A. R. Co.*, 73 N. Y. 38, it was held that where the negligence of an engineer of a train, in running it, is contributory with that of the company, in not sending out a sufficient number of brakemen, and both together cause an injury to a fellow servant of the engineer, the negligence of the engineer does not relieve the company from liability.

Retaining Switchman in Employ with Knowledge of His Habitual Negligence, and Negligence of Engineer in Not Observing Switch Target.—In an action against a railroad for injuries to its employee, it appeared that a switchman of defendant, whose duty it was to see that the switches connected with the passenger tracks were locked

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and closed previous to the time of the passage of each train, and to be present when each train passed, and give a signal showing everything was right, was habitually absent from his post and neglected his duties, and that this was with the knowledge of defendant's division superintendent, and under circumstances charging defendant with knowledge thereof. A train, upon which plaintiff was a brakeman, was derailed because of a misplaced switch, such switchman having opened it and left the yard without closing it a short time before the train was due, and plaintiff was injured thereby. It was held that the negligence of the engineer of the train in not observing the target at the switch, which showed it out of place, and in running the train at a high rate of speed did not excuse defendant's negligence in retaining the switchman in its employ after knowledge of his habitual neglect of duty. *Coppins v. New York, etc., R. Co.*, 122 N. Y. 557, 25 N. E. 915, 44 Am. & Eng. R. Cas., 618.

Negligence in Retaining Switchman and Negligence of Engineer in Failing to Stop Train in Obedience to Rule.—In *Wood v. New York Cent., etc., R. Co.*, 32 N. Y. App. Div., 606, an action for the death of a railroad employee, caused by a collision, the concurrent result of the negligence of the engineer of the train on which deceased was a fireman, in neglecting to obey the rules of the company by failing to stop the train, and of defendant's switchman, alleged to have been known to be incompetent by defendant's officers, in not disconnecting a switch, it was held that defendant was liable if the accident would not have occurred but for the negligence of such switchman, and if it was negligence in defendant to continue the switchman in its employ.

Incapacitated Fellow Servant Ordered to Lift Weight, and His Negligence in Attempting to Do So.—Where injury to a servant is the result of the negligence of a vice principal in ordering a fellow servant to assist in carrying a weight, when chargeable with notice that he is physically incapacitated, and that of the fellow servant, in attempting to do so and letting the weight fall, the master is liable. So held in *Galveston, etc., Ry. Co. v. Sherwood* (Tex. Civ. App.), 67 S. W. 776, 4 R. R. R. 564, 27 Am. & Eng. R. Cas., N. S., 564.

6. Negligence with Respect to Orders, Instructions or Warnings.

Failure of Foreman to Assist Plaintiff to Hold One End of Weight and Negligence of Fellow Servants in Lifting Other End.—In *Missouri, K. & T. Ry. Co. v. Hanning*, 20 Tex. Civ. App. 649, 49 S. W. 116, it is held that where injury to a servant, sustained while he was assisting in unloading a car, was the result of the negligence of his foreman in failing to aid plaintiff in holding up one end of a weight, as he induced him to believe he would, and that of plaintiff's fellow servants, in lifting the other end when they saw that the foreman did not have hold, there may be a recovery against the master.

Failure to Warn and Instruct Inexperienced or Youthful Servant—Negligence of Fellow Servants Immediate Cause.—The master of one, who, from youth, inexperience, or lack of intelligence, cannot comprehend the risks of his hazardous employment, must explain the danger to such servant before putting him to work, and if he fails to do so, he will be liable for an injury to him resulting from the danger known to the employer, and unknown to the servant, although the immediate cause of the injury was the negligence of his fellow servants. So held in *Jones v. Florence Mining Co.*, 66 Wis. 268, 28 N. W. 207.

Negligence of Foreman in Giving Order after Failing to Perform Certain Act.—Where an injury to a servant was caused by negligence of a fellow servant in failing to perform a certain act, and also the negligence of the same person, acting as foreman or vice principal, in giving a certain order without having performed the act in question, the injured servant was entitled to recover. So held in *Illinois So. Ry. Co. v. Marshall* (Ill.), 13 R. R. 95, 36 Am. & Eng. R. Cas., N. S., 95, 71 N. E. 597.

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Negligence of Fellow Servant in Executing Negligent Order of Vice Principal as to Management of Train.—In *Pittsburgh, etc., R. Co. v. Henderson*, 37 Ohio St. 549, 5 Am. & Eng. R. Cas. 529, it is held that where a railroad is sued by one of its employees for personal injuries resulting from the enforcement of an order of the company's superintendent as to the management of a particular train, which order was unreasonable and its enforcement dangerous to such employee, the fact of the negligence of a fellow servant of the employee, while executing such order, contributed in causing the injury was no defense.

7. Negligence in Managing Trains, Cars or Locomotives.

Collision with Another Car—Injury to Motorman.—In an action for injury to a motorman in a collision with another car, plaintiff was entitled to recover, though the injury was the result of the combined negligence of defendant and plaintiff's fellow servant. So held in *Cole v. St. Louis Transit Co. (Mo.)*, 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583, 81 S. W. 1138.

Collision—Failure to Sidetrack—Conductor Asleep—Engineer with Slow Watch.—When a freight train reached a station in Louisiana, at which it should have sidetracked for a passenger train, its conductor was asleep; and the engineer, whose watch was slow, undertook to make the next station. In the collision with the passenger train which ensued, a fellow servant of the engineer was killed. By the Louisiana law a principal is liable where the negligence of the vice principal contributes with that of a fellow servant to cause the injury. It was held that the conductor's negligence (he being a vice principal) contributed with that of the engineer, so as to charge the railroad company. *St. Louis, etc., Ry. Co. v. Robertson (Ark.)*, 7 R. R. R. 78, 30 Am. & Eng. R. Cas., N. S., 78, 72 S. W. 893.

Injury to Fireman—Negligence of Brakeman in Leaving Cars to Be Coupled on Bridge and Dangerous Speed.—Where a fireman is injured through the concurrent negligence of the conductor of his train, his vice principal, in permitting the engine to approach with a dangerous speed the cars to which a coupling was to be made, and of a brakeman, his fellow servant, in leaving cars so that the coupling had to be made on a bridge, the negligence of the latter was no defense in an action against the railroad. So held in *Virginia & S. W. R. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33, 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795.

Inexperienced Fireman Permitted by Vice Principal to Operate Engine—Brakeman Killed through Negligent Operation.—In *Norfolk & W. R. Co. v. Thomas*, 90 Va. 205, 17 S. E. 884, it appeared that an engineer, with the knowledge and permission of the conductor, a vice principal, left his engine to be operated by an inexperienced fireman, and that, while making a flying switch, by the improper management of the engine by the fireman, the brakeman was killed. It was held that the railroad was liable.

Injury to Engine Hostler—Negligence of Yardmaster and Brakeman—Collision.—In *Norfolk & W. R. Co. v. Phelps*, 90 Va. 665, 19 S. E. 652, it appeared that an engine hostler was injured through the negligence of the yardmaster, a vice principal, in sending him forward with an engine on a track upon which the yardmaster had thrown some box cars in charge of a brakeman; and that the negligence of the brakeman, his fellow servant, in bringing the cars too close to a switch on which such hostler was directed by the yardmaster to take the engine, contributed to the accident. It was held that the railroad company was liable.

Collision Caused by Vice Principal—Failure of Fellow Servant to Keep Lookout.—Where a fireman was injured by a collision caused by his master's vice principal, the fact that it would have been averted had the driver of the fireman's locomotive kept a proper lookout is no defense in an action against the master. So held in *Cincinnati, etc., R. Co. v. Clark*, 57 Fed. Rep. 125.

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Employee Struck by Plank Knocked from Track—Negligence in Running Engine and Fellow-Servants' Negligence in Leaving Plank.—Where injury to a railroad employee, sustained while he was engaged in moving a boiler across his master's railroad, was the result of the negligence of an engine crew, who were not his fellow servants, in running the engine over the track at the time and in failing to discover that, if they did so, there would be a collision with the plank which struck plaintiff, and the negligence of his fellow servants, in leaving the plank in a position to be struck by the engine, the master is liable. So held in *Ray v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.), 80 S. W. 112.

D. RATIONALE OF DOCTRINE.

1. Negligence of One Joint Tort-Ffeasor No Excuse for That of the Other.

A person is liable for an injury caused by the concurring negligence of himself and a third party, to the same extent as for an injury caused entirely by his own negligence. *Anthony v. Leeret*, 105 N. Y. 591, 12 N. E. 561. And this rule is as applicable when the joint tort-feasors are the master and a fellow servant of an employee injured through their combined negligence as when there is no contract connection between the parties. And negligence of plaintiff's fellow servant does not prevent recovery against one who was not their master, whose negligence contributed with that of the fellow servant in causing plaintiff's injury. *St. Louis Nat. Stock-Yards v. Godfrey* (Ill.), 65 N. E. 90, 7 R. R. R. 28, 30 Am. & Eng. R. Cas., N. S., 28.

In *McKinney, Fellow Servants*, § 16, the author says: "If the negligence of the master contributes to the injury to the servant, it must necessarily become an immediate cause of the injury, and it is no defense that another is likewise guilty of wrong."

Collision between Trains.—In *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 11 Am. & Eng. R. Cas. 254, 1 Sup. Ct. Rep. 493, it was held that in an action for personal injuries caused by a collision between two trains, an instruction to the effect that if the negligence of the company had a share in producing the injury the company is liable, even though the negligence of a fellow servant was contributory also, is not erroneous, for if the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong.

2. Assumption of Risk from Fellow Servant's Negligence.

Although a servant impliedly contracts to assume any risks from the negligence of his fellow servants, the contract of service does not impliedly exempt the master from liability for injury due solely or partly from his failure to perform a duty to his servant, that is, the servant does not impliedly assume a risk party created by his master's negligence. *Rice Bullen Matting Co. v. Paulsen*, 51 Ill. App. 123; *McGinn v. McCormick*, 109 La. 396, 33 So. 382; *Anthony v. Leeret*, 105 N. Y. 591, 12 N. E. 561; *Hollingsworth v. Long Island R. Co.*, 91 Hun 641, 36 N. Y. Supp. 1126; *Warn v. New York Cent. & H. R. R. Co.*, 80 Hun 71, 29 N. Y. Supp. 897; *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 238; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449; *Craig v. Chicago & A. R. Co.*, 54 Mo. App. 523.

In *Richmond & Danville R. Co. v. George*, 88 Va. 223, 13 S. E. 429, it is said in the opinion: "The servant, * * * does not contract against the combined negligence of a fellow servant and of his employee."

In *Warn v. New York Cent. & H. R. R. Co.*, 80 Hun 71, 29 N. Y. Supp. 897, it is held that the rule that a servant assumes the risks of the employment is subject to the limitation that the master must exercise reasonable care to guard the servant, while engaged in his duties, from unnecessary hazards, including risks from the negli-

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gence of fellow servants, and the negligence of one servant does not excuse the master from liability to a fellow servant for an injury which would not have happened had the master performed his duty.

In *Benzing v. Steinway & Sons*, 101 N. Y. 547, 5 N. E. 449, it is said in the opinion: "It has been repeatedly held that the risks of the service which a servant assumes, in entering the employment of a master, are those only which occur after the due performance by the employer of those duties which the law enjoins upon him, and that the negligence of the master co-operating with that of a servant in producing injury to a coservant, renders the master liable."

The doctrine of the nonliability of the master for injuries inflicted upon one of his servants by the negligence of a fellow servant is predicated in part upon the presumed assumption by each servant of the risk to be incurred from the negligence of his fellow servants, and in part, it is said, upon considerations of public policy, but such a foundation affords no support for the proposition that an injured servant is to be considered as having assumed the risk to be incurred from the negligence of the master, or from the negligence of the master combined with that of a fellow servant. So held in *McGinn v. McCormick*, 109 La. 396, 33 So. 382.

In *Anthony v. Leeret*, 105 N. Y. 591, 12 N. E. 561, it is said in the opinion: "But it is claimed that the negligence of the defendants co-operated with that of Schmidt (plaintiff's fellow servant) in producing the injury. If this claim is well founded the plaintiff is entitled to recover, because for a wrong or injury occasioned by the joint or co-operative agency of two or more persons all the tortfeasors are separately or jointly liable, and there is no implied contract growing out of the contract of service that the servant shall take the risk of the master's negligence, or that the latter shall be exempt from responsibility to the servant for his own personal wrongs."

II. MASTER NOT LIABLE UNLESS HIS NEGLIGENCE CONTRIBUTED IN CAUSING INJURY.

Although the authorities do not make it very clear as to what degree, or to what extent, the master must have been negligent to render him liable for an injury to his servant, which resulted from his negligence combined with that of the injured employee's fellow servant, they all agree upon the proposition, that the master is not liable unless his negligent act or omission contributed, as one of its causes, in producing the injury.

United States.—*Little Rock & M. R. R. Co. v. Barry* (C. C. A.), 84 Fed. Rep. 944; *Lowndes v. The Phoenix* (D. C.), 34 Fed. Rep. 760; *Northern Pac. R. Co. v. Charless* (C. C. A.), 51 Fed. Rep. 562; *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932; *Union Pac. Ry. Co. v. Callaghan* (C. C. A.), 56 Fed. Rep. 988.

California.—*Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256.

Colorado.—*Colorado v. Harper*, 32 Colo. 156.

Georgia.—*Jackson v. Merchants & Miners' Transp. Co.*, 118 Ga. 651, 44 S. E. 834; *Cheaney v. Ocean Steamship Co.*, 92 Ga. 723, 19 S. E. 33.

Illinois.—*Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285; *Swift v. Rutkowski*, 82 Ill. App. 108.

Kansas.—*Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343.

Kentucky.—*Edmondson v. Kentucky Cent. R. Co.*, 49 S. W. 200.

New York.—*Bryant v. New York Cent., etc., R. Co.*, 81 Hun (N. Y. Supr. Ct.), 164; *Coppins v. New York Cent. & H. R. R. Co.* (N. Y.), 48 Hun 292, 44 Am. & Eng. R. Cas. 618; *Hall v. Coperstown, etc., R. R. Co.*, 49 Hun 373, 3 N. Y. Supp. 584; *Harvey v. New York Cent. & H. R. R. Co.*, 88 N. Y. 481, 8 Am. & Eng. R. Cas. 515; *Sutter v. New York Cent. & H. R. R.*, 79 N. Y. App. Div. 362; *Thall v. Carme*, 24 N. Y. S. R. 270, 5 N. Y. Supp. 244;

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Whittaker *v.* Delaware & H. Canal Co., 49 Hun 400, 10 N. Y. Supp. 645; Wood *v.* New York Cent. & H. R. R. Co., 32 N. Y. App. Div. 606.

North Carolina.—Bean *v.* Western North Car. R. Co., 107 N. Car. 731, 12 S. E. 600.

Oregon.—Knahtla *v.* Oregon Short Line, etc., Ry. Co., 21 Ore. 136, 27 Pac. 91.

Tennessee.—Illinois Cent. R. Co. *v.* Spence, 93 Tenn. 173, 23 S. W. 211; Louisville, etc., R. Co. *v.* Kenley, 92 Tenn. 205, 21 S. W. 326.

Texas.—Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800; Missouri, etc., R. Co. *v.* Woods (Tex. Civ. App.), 25 S. W. 741; Rose *v.* Gulf, etc., R. Co. (Tex.) 17 S. W. 789; International & G. N. R. Co. *v.* Williams (Tex. Civ. App.), 34 S. W. 161, 3 R. R. R. 778, 26 Am. & Eng. R. Cas., N. S., 778; Louisiana Western Extension Ry. Co. *v.* Carnstens (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 781, 47 S. W. 36; St. Louis, etc., R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789.

Utah.—Pool *v.* Southern Pac. Co., 7 Utah 303, 16 Am. & Eng. R. Cas., N. S., 551, 26 Pac. 654.

Vermont.—Morrisey *v.* Hughes, 65 Vt. 553, 27 Atl. 205.

Virginia.—McCoy *v.* Norfolk & C. R. Co. (Va.), 37 S. E. 788, 22 Am. & Eng. R. Cas., N. S., 838; Norfolk, etc., R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Richmond & D. R. Co. *v.* Tribble's Adm'r, 97 Va. 495, 24 S. E. 278.

Washington.—Costa *v.* Pacific Coast Co., 26 Wash. 138, 66 Pac. 398.

Where the negligence of the master is combined with that of a fellow servant in causing an injury to an employee, and neither is the efficient cause alone, the master is liable. So held in Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 22 N. E. 285.

In *Morrisey v. Hughes*, 65 Vt. 553, 27 Atl. 205, it is said in the opinion: "The law now seems to be well settled that when the negligence of the defendant (plaintiff's master), contributes, that is to say has a share in causing the injury, the defendant is liable, even though the negligence of a fellow servant of the plaintiff is also contributory."

Where the master is guilty of actionable negligence toward a servant, he cannot escape liability for his negligence in producing the injury by showing that a fellow servant is also a joint tort-feasor with him, or is guilty of negligence that assisted the master in injuring his fellow servant. So held in *St. Louis, etc., R. Co. v. McClain*, 80 Tex. 85, 15 S. W. 789.

Injury to Fireman—Negligence of Conductor and Engineer.—A railroad is liable for injury to a fireman from the negligence of the engineer, his fellow servant, in the operation of the train, if the negligence of the conductor, having charge of the train as a vice principal, contributed thereto materially and proximately. So held in *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 23 S. W. 211.

Negligence of Fellow Servant in Using Defective Appliances.—Where the negligence of the master in furnishing defective appliances is the direct cause of injury to his servant, the master is liable although the negligence of fellow servants in using such appliances contributed to the accident. So held in *International & G. N. R. Co. v. Williams* (Tex. Civ. App.), 34 S. W. 161.

Collision—Negligence of Fellow Servant in Not Observing Rules.—Where an injury to an employee from a collision is attributable to the negligence of his fellow servant in not observing the master's rules while running a train, if negligence of the master to any material extent co-operates with that of the fellow servant in causing the accident, the master may be liable. So held in *Bryant v. New York Cent., etc., R. Co.*, 81 Hun (N. Y. Supr. Ct.), 164.

Defective Couplings—Negligence in Signaling to Back Train.—In *McCoy v. Norfolk & C. R. Co.*, 99 Va. 132, 37 S. E. 788, 22 Am. & Eng. R. Cas., N. S., 838, it is held, in an action by a brakeman against

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a railroad company for injuries that an instruction that, if the negligence of a fellow servant in signaling the engineer to back the train concurred with the negligence of defendant in failing to maintain safe and sound couplings, in producing plaintiff's injury, the concurring negligence of the fellow servant did not affect the liability of the company, and it was liable for the injuries as though it only was at fault, was properly refused, since it allowed recovery without showing that the master's negligence proximately contributed to the injury.

Unsafe Appliances—Failure to Inspect.—In *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226, it is held that if a servant is injured through the failure of the master to provide, inspect, and keep in good repair reasonably safe appliances for the use of a servant in his employment, and such failure of the master proximately contributed to the injury, it is no defense for the master that the negligence of a fellow servant also contributed to produce the injury.

Reduction of Force, Imposition of Distracting Duties upon Switchman, and His Carelessness in Failing to Close Switch.—In *Harvey v. New York Cent. & H. R. R. Co.*, 88 N. Y. 481, 8 Am. & Eng. R. Cas. 515, it appeared that an engine was thrown from the track by a misplaced switch the switchman had neglected to close, he being engaged at the time in conversation; and a fireman upon the engine was killed. Plaintiff claimed that the switchman was inexperienced and incompetent, and that, by a reduction of the force, duties too numerous and distracting had been imposed upon the switchman. He had been in defendant's employ for seven years, until three months before the accident, as baggageman at the station, occasionally acting as switchman. Three out of six men formerly employed had been discharged, and the duties of switchman devolved upon him, which he had performed for three months. It was held that it was immaterial what fault defendant had committed in respect to the number of men employed or the duties imposed upon such switchman, unless such fault contributed to the injury, and that his failure to close the switch did not arise from inability to perform the duties, but was the result of inattention and carelessness, and that therefore, the injury was caused by the negligence of a fellow servant.

Collision between Gravel Train and Regular Train—Failure to Remove Gravel Train from Track or to Give Notice of Its Situation.—In *Hall v. Cooperstown, etc., R. Co.*, 49 Hun 373, 3 N. Y. Supp. 584, it appeared that plaintiff's intestate, an employee on a gravel train, was killed by a collision between the gravel train and a regular train; and that the cause of the accident was the neglect of those in charge of the gravel train, either to remove it from the main track in time to let the other train pass, or to give notice of its situation on the track. The court charged that if they found that there was negligence both on the part of deceased's fellow servants and of the railroad company itself, that it was liable. It was held that this was error, as it was in effect a charge; that if defendant was guilty of any negligence whatever, it was liable, even though the accident would have occurred without such negligence on its part.

Collision between Train and Stationary Locomotive, Sent Out without Headlight—Negligence of Fellow Servants in Running Locomotive upon Main Track without Special Order.—In an action for the death of a fireman, it appeared that his locomotive after helping a west-bound freight train from S. to Q. street, was detached from such train, ran on the east-bound traffic track, and stopped a short distance from the depot where it stood with its head to the west without light on that end, but with a light on the other end, which, for the purpose of the return trip to S. was to be the head; that while the engine was standing thus, the engineer having entered the depot for coals, an east-bound train arrived from the west and collided with the locomotive, and plaintiff's intestate was killed; that on the day preceding the accident the headlight of such locomotive was removed for repairs, and had not been restored. Plaintiff alleged that the ab-

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sence of the headlight was the cause of the accident, and that defendant was negligent in sending out the locomotive without a headlight. Defendant alleged that the accident was caused by negligence of decedent's fellow servants in violating rules of defendant by running the engine upon the main track without a special order and in not approaching the station cautiously. The jury were instructed that even if they found that the fellow servants of decedent were guilty of negligence, yet if they found defendant was negligent in allowing the locomotive to run without a headlight, and that negligence contributed to the injury, there could be no recovery. It was held that this was error. And, in this connection, it is said in the opinion: "Each of the three acts above enumerated (sending the engine out without a headlight, running the engine upon the main track without a special order, and failure to use caution in running the train to the station) may have been one of several causes, each contributing to the accident. The defendant is not liable to its employees for the damage resulting from two of the causes, and the jury should have been instructed that the defendant was not liable unless they found the accident would not have happened but for the absence of the headlight." *Whittaker v. Delaware & H. Canal Co.*, 49 Hun 400, 3 N. Y. S. 576.

Where Master's Negligence Slight.—That the negligence of the master concurring with the negligence of a fellow servant is slight, does not take the case out of the rule, provided such negligence contributed to produce the injury. *O'Laughlin v. New York, C. & H. R. R. Co.*, 9 N. Y. S. R. 384, 45 Hun 588, affirmed in 113 N. Y. 623, 20 N. E. 876.

III. WHERE INJURY WOULD NOT HAVE OCCURRED HAD MASTER PERFORMED HIS DUTY.

Of course, under the general rule, the master is liable if the injury would not have occurred, or could have been prevented, had he performed his duty to the injured employee.

United States.—*Northern Pac. R. Co. v. Charless* (C. C. A.), 51 Fed. Rep. 562; *Killien v. Hyde* (D. C.), 63 Fed. Rep. 172; *The Phoenix* (D. C.), 34 Fed. Rep. 760; *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. Rep. 723, 1 U. S. App. 96, 1 C. C. A. 428.

California.—*Keast v. Santa Ysabel Gold Mining Co.*, 136 Cal. 256.

Colorado.—*Tanner v. Harper*, 32 Colo. 156.

Georgia.—*Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33; *Jackson v. Merchants & Miner's Transp. Co.*, 118 Ga. 651, 44 S. E. 834.

Minnesota.—*McMahon v. Davidson*, 12 Minn. 357.

New York.—*Coppins v. New York Cent. & H. R. R. Co.*, 122 N. Y. 557, 25 N. E. 919, 44 Am. & Eng. R. Cas. 618; *Hall v. Cooperstown & S. V. R. Co.*, 49 Hun 373, 3 N. Y. Supp. 584; *O'Laughlin v. New York Cent. & H. R. R. Co.*, 9 N. Y. St. Rep. 384, 45 Hun 588; *Shiner v. Russell*, 6 N. Y. St. Ry. 78; *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575; *Sutter v. New York Cent., etc., R. Co.*, 79 N. Y. App. Div. 362; *Thall v. Carme*, 24 N. Y. S. R. 270, 5 N. Y. Supp. 244; *Wood v. New York Cent., etc., R. Co.*, 32 N. Y. App. Div. 606.

North Carolina.—*Bean v. Western North Car. R. Co.*, 107 N. Car. 731, 12 S. E. 600.

Oregon.—*Knahtla v. Oregon Short Line, etc., Ry. Co.*, 21 Ore. 136, 27 Pac. 91.

Texas.—*Howe v. St. Clair*, 8 Tex. Civ. App. 101, 27 S. W. 800; *Louisiana, etc., Ry. Co. v. Carstens* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 781, 47 N. W. 36.

Washington.—*Conine v. Olympia Logging Co. (Wash.)*, 15 R. R. R. 387, 38 Am. & Eng. R. Cas., N. S., 387, 78 Pac. 932; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398.

Wisconsin.—*Craven v. Smith*, 89 Wis. 119, 61 N. W. 317.

In *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398, it is said in the opinion: "The rule seems to be that the negligence of a fellow

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servant does not excuse the master from liability to coservant for an injury which would not have happened, had the master performed his duty."

Where a servant is injured by the negligence of a fellow servant, but the injury would not have happened except for the negligence of the master, the latter is liable. So held in *Tanner v. Harper*, 32 Colo. 156.

In *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33, it is said in the opinion the negligence of a fellow servant does not excuse the master from liability to a coservant for an injury which would not have happened had the master performed his duty.

A master will not be relieved from liability if his own negligence contributed to an injury to his employee, by the fact that the accident was in part attributable to the negligence of a fellow servant, if the negligence of the latter would not have caused the injury but for the negligence of the master. So held in *Knahtla v. Oregon Short Line, etc., Ry. Co.*, 21 Ore. 136, 27 Pac. 91.

In *Coppins v. New York Cent. & H. R. Co.*, 122 N. Y. 557, 44 Am. & Eng. R. Cas. 618, 25 N. E. 919, it was held that the master is not excused from liability for injury to one of his servants, which would not have happened if the master had performed his duty, by the fact that the negligence of fellow servants also contributed to the injury.

In *Louisiana Western Extension Ry. Co. v. Carstens* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 781, 47 N. W. 36, it is held that if a servant's injuries are the result of the negligence of a servant, and such negligence on the part of the master that without it the injuries would not have resulted, the master is liable.

Where injury to an employee would not have been sustained but for the negligence of the master, the master is liable notwithstanding it would have been prevented or avoided but for the negligence of a fellow servant. So held in *Howe v. St. Clair*, 8 Tex. Civ. App. 101, 27 S. W. 800.

Failure to Furnish Proper Machinery.—Negligence of a fellow servant will not excuse a railroad company, the master, from liability to a coservant for an injury which would not have happened had proper machinery been furnished. So held in *Northern Pac. R. Co. v. Charles* (C. C. A.), 51 Fed. Rep. 562.

Derailment—Abandoned Switch Reopened and Negligently Left Partly Opened—Failure to Replace Light.—In an action by an employee against his company to recover for personal injuries, it appeared that plaintiff was injured by the derailment of a train on which he was engineer, owing to its running into a partly opened switch; that, about a year before, the switch had been abandoned, the lights taken down, and the rails spiked, but that it had been reopened, but no light had been placed on it. It was contended by the company that the absence of the lights was not the proximate cause of the accident, that if the switch had been locked, the train would have passed in safety, and that the opening or unlocking of the switch was caused by a stranger or trespasser, or by the negligence of a fellow servant of plaintiff, and that he could not recover in either event. It was held that if the lights would have prevented the accident in the condition in which the switch was, the negligence of the company in reopening it for use without replacing the lights was just as much the proximate cause of the injury as the unlocking and turning of the switch rails, and if they were concurrent causes defendant would be liable. *Town v. Michigan Cent. R. Co.*, 84 Mich. 214, 47 N. W. 665.

Collision—Failure to Furnish Chimney for Headlight and Negligence in Running Train.—Where a conductor was injured in a collision, which was the concurrent result of the master's failure to provide a chimney for the headlight of the other train and the negligence of its trainmen in its management when attempting to run it over a crossing, and the accident would not have happened by the

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absence of the headlight, defendant was liable. So held in *Sutter v. New York Cent., etc., R. Co.*, 79 New York App. Div. 362.

Negligence of Engineer in Starting Engine without Signal and Failure to Provide Signal.—Plaintiff was engaged in attaching to a cable logs which were being dragged to defendant's logging camp by an engine. There was a signal wire or rope from the engine to the place where plaintiff was working, 60 rods from the engine, and was visible therefrom, but there was no signal provided for the engineer to advise the plaintiff that the engine would start. Plaintiff was injured by the negligence of the engineer in starting the engine without signal from the plaintiff, but his injuries could have been avoided by the defendant providing a signal for use by the engineer. It was held that the negligence of the engineer and that of the defendant concurred to produce plaintiff's injuries, and hence defendant was liable therefor. So held in *Conine v. Olympia Logging Co.* (Wash.), 15 R. R. R. 387, 38 Am. & Eng. R. Cas., N. S., 387, 78 Pac. 932.

Fall of Timber—Death of Miner—Defective Hook and Negligence in Allowing Timber to Jam.—In *Keast v. Santa Ysabel Gold Mining Co.*, 136 Cal. 256, an action for the death of a servant of defendant, caused by the fall of timber which became detached from a hook and fell down a shaft where deceased was employed as a miner, it was held that negligence on the part of deceased's fellow servants in permitting the timber to jam and ordering it to be lowered while jammed, could not relieve defendant from liability, if the accident would not have occurred if the hook had been reasonably safe for the purpose of lowering the timber.

Failure to Instruct and Warn Inexperienced Employee, Injured While Acting under Negligent Order of Fellow Servant.—In *Thall v. Carme*, 24 N. Y. S. R. 270, 5 N. Y. Supp. 244, it is held that where the master is sued for injuries to a young and inexperienced servant, and is charged with negligence in not properly instructing and warning the servant, it is no defense that the injured servant was acting at the time under the orders of a fellow servant; and that if proper instructions from the company would have put such injured employee on his guard against the negligence of his fellow servant, and the accident would have thereby been prevented, the master is liable.

Collision—Death of Fireman—Failure of Engineer to Stop Train and Switch Left Open—Negligence in Retaining Incompetent Switchman.—Where a collision causing the death of a fireman was the concurrent result of the negligence of the engineer of his train in neglecting to obey the rules of defendant by failing to stop the train, and that of a switchman, in not disconnecting a switch, defendant was liable, if the accident would not have happened but for the negligence of the switchman, if the company, knowing the switchman to be incompetent, had been negligent in retaining him in its employ. So held in *Wood v. New York Cent., etc., R. Co.*, 32 N. Y. App. Div. 606.

Unsafe Place to Work.—Where a master fails to furnish his servant a reasonably safe place to work, and injury to the servant could not have been sustained had the master performed such duty, he is liable for the injury, though it resulted from the concurrent negligence of the master and a fellow servant of the injured employee. So held in *Jackson v. Merchants' & Miners' Transportation Co.*, 118 Ga. 651, 44 S. E. 834.

Failure of Track Walker to Report Danger from Rocks.—In *Bean v. Western North Car. R. Co.*, 107 N. Car. 731, 12 S. E. 600, it was held, that conceding trainmen and track walkers to be fellow servants, and that the track walker was negligent in failing to report the danger threatened by overhanging rocks, on the mountain side, which had been loosened by blasting at the original construction of the road, the company was nevertheless liable, since the accident would not have occurred but for its failure to provide a safe place to work in the first instance.

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Possibility of Accident Greatly Lessened Had Work Place Been Safe.—In *Pool v. Southern Pac. Co.*, 7 Utah 303, 16 Am. & Eng. R. Cas., N. S., 551, 26 Pac. 654, it is held that even if the injury to an employee was directly caused by the act of a fellow servant, if the chances of its occurrence would have been greatly less if the master had furnished a safe place to work, and his negligence in this regard contributed to the injury, the master is liable.

IV. WHERE ACCIDENT WOULD NOT HAVE OCCURRED HAD THE FELLOW SERVANT EXERCISED DUE CARE.

So the fact that the injury to the servant would not have happened, or the accident might have been prevented, had the fellow servant, whose negligence concurred with that of the master in causing the injury, exercised due care, does not relieve the master from liability. *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 206, 2 Am. & Eng. R. Cas. 57, 37 Am. Rep. 491; *Clyde v. Richmond & D. R. Co.* (C. C.), 59 Fed. Rep. 394; *Finley v. Richmond & D. R. Co.*, 59 Fed. Rep. 419; *Howe v. St. Clair*, 8 Tex. Civ. App. 101, 27 S. W. 800; *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 280; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.), 500; *Simmons v. New Bedford, V. & N. S. Co.*, 97 Mass. 361; *Lane v. Atlantic Works*, 111 Mass. 136.

Where Fellow-Servant's Negligence Does Not Break Sequence of Events.—In *Union Pac. Ry. Co. v. Callaghan* (C. C. A.), 56 Fed. Rep. 988, it is said in the opinion: "The independent intervening cause which will prevent a recovery on account of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that could not have been reasonably anticipated. The concurrent or succeeding negligence of a fellow servant or a third person which does not break the sequence of events is not such a cause and constitutes no defense for the original wrongdoer, although, in the absence of the concurrent or succeeding negligence, the accident would not have happened.

Possibility of Preventing Accident by Exercise of Proper Care in Operating Defective Machine.—In *Shearm. & Redf. Neg.* § 194, it is laid down as a rule that: "The fact that a servant may, by care and caution, so operate a defective and dangerous machine as not to produce injury to his fellow servant, does not exempt the master from his liability for an omission to exercise reasonable care and prudence in furnishing safe and suitable appliances." See also, *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575; *Grant v. Keystone Lumber Co.*, 119 Wis. 229; *Sherman v. Menominee River Lumber Co.*, 72 Wis. 122, 39 N. W. 365.

In *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 206, 2 Am. & Eng. R. Cas. 57, it was held that where the employee of a railroad was injured by the sudden starting of a locomotive, caused by its being defective and out of repair, of which defects the corporation had notice, it is no defense that the engineer could have so managed the engine so as to have prevented the accident.

Derailment—Defective Rail and Excessive Speed.—A railroad is liable for injuries to a fireman from the derailment of a train, caused by the worn condition of a rail, although the accident would not have occurred but for the negligence of the engineer, the fireman's fellow servant, in running the train at a rate of speed greater than authorized by the schedule. So held in *Clyde v. Richmond & D. R. Co.* (C. C.), 59 Fed. Rep. 394.

Defective Engine Brake—Failure of Engineer to Use Brake on Tender.—A railroad is liable for injury to a brakeman from the failure of a defective engine brake to work properly, although there was a good brake on the tender, by which the engineer, his fellow servant,

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could have controlled the train. So held in *Finley v. Richmond & D. R. Co.*, 59 Fed. Rep. 419.

Death of Switchman—Negligence of Fireman in Signaling Train to Start without Giving Notice and Negligence of Fellow Switchman.—Where the death of a switchman is the concurrent result of the negligence of his foreman in signaling a train to start without giving notice, while deceased was between a derailed car and a platform, and in negligently causing the train to be backed for the purpose of releasing him, and the negligence of a fellow switchman, the master is liable, although the death would not have resulted had not the switchman been guilty of concurring negligence. So held in *Houston & T. C. Ry. Co. v. White*, 23 Tex. Civ. App. 280, 56 S. W. 204.

Trapdoor Left Open in Line of Travel—Failure of Fellow Servant to Warn.—Where the conduct of the master in constructing a trapdoor and leaving it open in the line of travel contributed to the injury of his servant, that a fellow servant of the injured employee saw and knew of the danger, and might have prevented the accident by warning him, is no defense to an action against the master. So held in *Hayes v. Frederick Stearns & Co.*, 130 Mich. 287.

Where Fellow-Servant's Negligence Sole Cause of Injury.—But where the negligence of the servant is such as to have caused the injury even had the master not been negligent, then the servant's negligence is the sole cause of the injury, and the master is not liable. So held in *Gila Valley, etc., Ry. Co. v. Lyon (Ariz.)*, 16 R. R. R. 745, 39 Am. & Eng. R. Cas., N. S., 745, 80 Pac. 337.

Train Short of Hands and Negligence of Fellow Brakeman.—And in *Hayes v. Western R. Corp.*, 57 Mass. 270, it is held that where a brakeman is injured in consequence of the negligence of a fellow brakeman, and the injury would not have happened had the latter performed his duty, the fact that the train was short of hands does not render the railroad company liable.

Collision between Side-Tracked Cars and Approaching Train—Negligence of Trainmaster and Negligence in Failing to Set Brakes.—And where a brakeman negligently failed to set the brakes on cars left on the main track, while other cars were being side-tracked, and the unsecured cars ran down a grade and collided with an approaching train, causing the death of a fireman, there can be no recovery against the master, based on the negligence of the trainmaster in running the two trains too close together, where there is no proof that they were dangerously near if proper care had been exercised in managing them. So held in *Relyea v. Kansas City, etc., R. Co. (Mo.)*, 19 S. W. 1116.

V. PROXIMATE CAUSE.

According to the wording of some of the authorities, the master's liability depends upon whether his negligence or that of the fellow servant was the proximate cause of the injury to another employee. But the use of the term proximate cause in this connection is somewhat confusing, as it is generally held that if the negligence of a master contributes to an injury to his servant, it must necessarily become an immediate cause of the injury. See the following decisions.

United States.—*Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409, 20 Sup. Ct. Rep. 967; *Grand Trunk R. Co. v. Cummings*, 11 Am. & Eng. R. Cas. 254, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Union Pac R. Co. v. Callaghan*, 56 Fed. Rep. 988, 6 C. C. A. 205.

Arkansas.—*Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445, 78 S. W. 220.

California.—*Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 68 S. W. 771; *Fisk v. Central Pac. R. Co.*, 72 Cal. 38, 13 Pac. 144.

Connecticut.—*Farrell v. Eastern Mach. Co.*, 77 Conn. 484, 59 Atl. 611.

Georgia.—*Jackson v. Merchants', etc., Transp. Co.*, 118 Ga. 651, 44 S. E. 834.

Illinois.—*Chicago, etc., R. Co. v. Wise*, 206 Ill. 453; *Pullman Palace Car Co. v. Laack*, 143 Ill. 243, 32 N. E. 285.

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Indiana.—Cincinnati, I. St. L. & C. Ry. Co. *v.* Lang, 118 Ind. 579, 21 N. E. 317.

Iowa.—Gordon *v.* Chicago, etc., Ry. Co. (Iowa), 18 R. R. R. 646, 41 Am. & Eng. R. Cas., N. S., 646, 106 N. W. 177.

Kansas.—Atchison, T. & S. F. R. Co. *v.* Lannigan, 56 Kan. 109, 42 Pac. 343.

Kentucky.—Linck *v.* Louisville, etc., R. Co., 107 Ky. 370, 54 S. W. 184.

Louisiana.—Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342; Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363.

Massachusetts.—Myers *v.* Hudson Iron R. Co., 150 Mass. 125, 22 N. E. 631; Hayes *v.* Western R. Corp., 57 Mass. 270.

Michigan.—Anderson *v.* Michigan Cent. R. Co., 107 Mich. 591, 65 N. W. 585; Smith *v.* Potter, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. 273.

Minnesota.—Delude *v.* St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Ransier *v.* Minneapolis & St. L. R. Co., 32 Minn. 331, 21 Am. & Eng. R. Cas. 601, 20 N. W. 332; Franklin *v.* Winona & St. P. R. Co., 31 Am. & Eng. R. Cas. 211, 37 Minn. 409, 34 N. W. 898.

Mississippi.—Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 537.

Missouri.—Cole *v.* St. Louis Transit Co., 183 Mo. 81, 81 S. W. 1138; Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103.

New Jersey.—Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

New York.—Abel *v.* Delaware & H. Canal Co., 128 N. Y. 662, 28 N. E. 663; Cone *v.* Delaware, L. & W. R. Co. 81 N. Y. 206, 2 Am. & Eng. R. Cas. 57, 37 Am. Rep. 491.

North Carolina.—Bean *v.* Western North Carolina R. Co., 107 N. Car. 731, 12 S. E. 600.

North Dakota.—Boss *v.* Northern Pac. R. Co., 2 N. Dak. 128, 49 N. W. 655.

Ohio.—Pittsburg, C. & St. L. Ry. Co. *v.* Henderson, 37 O. St. 549, 5 Am. & Eng. R. Cas. 529.

Oregon.—Carlson *v.* Oregon Short Line & U. N. Ry. Co., 21 Ore. 450, 28 Pac. 497.

Pennsylvania.—Kaiser *v.* Flaccus, 138 Pa. St. 332, 22 Atl. 88.

South Carolina.—Bodie *v.* Charleston, etc., R. Co., 66 S. Car. 302, 44 S. E. 493, 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95.

Tennessee.—Russell *v.* Dayton Coal, etc., Co., 109 Tenn. 43, 70 S. W. 1.

Texas.—Galveston, H. & S. A. Ry. Co. *v.* Templeton, 87 Tex. 42, 26 S. W. 1066; St. Louis & S. F. R. Co. *v.* McClain, 80 Tex. 85, 15 S. W. 789.

Utah.—Hicks *v.* Southern Pac. R. Co., 27 Utah, 526, 12 R. R. R. 332, 35 Am. & Eng. R. Cas., N. S., 332, 76 Pac. 625.

Vermont.—Morrisey *v.* Hughes, 65 Vt. 553, 27 Atl. 205.

Virginia.—Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 368, 41 S. E. 726.

Washington.—Howe *v.* Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100, 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624.

Wisconsin.—Stelter *v.* Chicago & N. W. R. Co., 46 Wis. 497, 1 N. W. 112; Grant *v.* Keystone Lumber Co., 119 Wis. 229.

A. AUTHORITIES APPARENTLY MAKING MASTER'S LIABILITY DEPEND UPON QUESTION OF PROXIMATE CAUSE.

Failure to Furnish Suitable Lantern and Negligence of Fellow Servant.—Where the proximate cause of an injury to a servant is the negligent failure of the master to furnish him with a suitable lantern with which to do the work, the fact that his fellow servant was guilty of negligence contributing to the injury does not necessarily bar recovery against the master. So held in Atchison, T. & S. F. R. Co. *v.* Lannigan, 56 Kan. 109, 42 Pac. 343.

Unprotected Machinery.—In Pullman Palace Car Co. *v.* Harkins,

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55 Fed. Rep. 932, it is held that the negligence of the master with respect to unprotected machinery, when concurring with the negligence of a fellow servant, must have been the proximate cause of the servant's death to render the master liable. See also, *Little Rock, etc., R. Co. v. Barry*, 84 Fed. Rep. 944; *Kevern v. Providence Gold, etc., Min. Co.*, 70 Cal. 392; *Henry v. St. Louis, etc., R. Co.*, 76 Mo. 288, 43 Am. Rep. 762, 12 Am. & Eng. R. Cas. 136.

Failure to Furnish Sufficient Hands for Work.—Where the proximate cause of an injury to a servant is his master's failure to furnish sufficient help to do his work, that the negligence of a fellow servant contributed to the injury will not relieve the master from liability. So held in *Swift & Co. v. Rutkowski*, 82 Ill. App. 108.

Injury to Brakeman While Ascending Car—Defective "Foot-rest" and Negligence of Engineer.—In an action by a brakeman against his company for personal injuries, there was evidence tending to show that they were sustained by reason of defendants' negligence in failing to supply a safe "foot-rest" for ascending to brakes on top of car. There was also evidence tending to show that the injuries resulted from the engineer's negligence in causing a sudden jam of the cars as the brakeman was ascending the car by means of the defective "foot-rest." It was held that plaintiff was entitled to recover, notwithstanding the negligence of the engineer, a fellow servant, if the defective "foot-rest" was the proximate cause of the injury. *Louisville, etc., R. Co. v. Kenley*, 92 Tenn. 207, 21 S. W. 326.

Burden of Proof.—Where a servant is injured through the master's negligence and the concurrent negligence of a fellow servant the burden is on plaintiff, in an action for such injury, to show that the master's negligence was the proximate cause of the injury. So held in *Union Pac. Ry. Co. v. Callaghan* (C. C. A.), 56 Fed. Rep. 988, 6 C. C. A. 205.

B. MASTER'S NEGLIGENCE WAS PROXIMATE CAUSE—ILLUSTRATIONS.

Injury to Car-coupler—Absence of Bumper and Negligence of Engineer in Backing Engine without Waiting for Usual Signal.—In *Richmond & D. R. Co. v. George*, 88 Va. 223, 13 S. E. 429, it appeared that a brakeman, in attempting to descend from car on front end of train, to uncouple the engine, while feeling for the bottom rung of the car ladder, which was missing, was injured by reason of the engineer, without waiting for the usual signal, suddenly backing the engine; that the bumper on end of car was broken off so that the tender came close to it; that the brakeman was not aware the bumper was broken; and that they had been made up under the supervision of the regular car inspector. It was held that the absence of the bumper was the proximate cause of the accident, and the master was liable.

Collision between Sections of Train—Defective Coupling and Negligence in Management of Forward Section.—In *Galveston, H. & S. A. Ry. Co. v. Sweeney*, 14 Tex. Civ. App. 216, 36 S. W. 800, it appeared that a train moving on a down grade parted because of a defective coupling, the rear cars dropping back, and the engineer then stopped the train, contrary to the rule of the company applicable in such cases, and without the exercise of proper care, and then on the approach of the rear section, suddenly started the engine, without removing the brakes, and thereby caused a second break in the train, and that the conductor was injured in a collision between the rear and middle sections. It was held that the separation of the rear cars because of the defective coupling was a proximate cause of the injury, concurring with the negligence of the engineer, the conductor's fellow servant, and that the negligence of the latter was no defense to and against the company.

Collision between Train and Sidetracked Train—Failure to Supply Substitute for Cupola Lamp Left for Repairs—Failure of Fellow Servant to Close Switch.—In *Denver & Rio Grande R. Co. v. Sipes*,

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26 Colo. 17, 55 Pac. 1093, it appeared that the rules of defendant required trains running at night to display the headlight in front and two or more red lights in the rear, and, when sidetracked to allow another train to pass, required the red lights to be removed or turned and green displayed toward the expected train when the track was clear; that it was the custom of the company to display a red light in the cupola of the caboose of freight trains, for which purpose a special kind of lamp was used and the light was removed when the train was sidetracked, as soon as the switch was closed; that a train was sent out unprovided with a cupola lamp, for the reason that its lamp had been left at the shops for repairs and none was supplied in its place; that the train was sidetracked to let a passenger train, meeting it, pass, and the conductor and rear brakeman, whose duty it was to close the switch when the train was on the sidetrack, were asleep and failed to close the switch; that the engineer, supposing the switch had been closed, covered the headlight of his engine, which was a signal to the approaching train that the track was clear; that the locomotive of the passenger train ran into the open switch, was derailed, and killed the fireman; and that if the cupola had been provided with a red light it would not have been removed till the switch had been closed, and the approaching trainmen would have seen it, and the collision would have been avoided. It was held that the failure to provide a light for the cupola was the proximate cause of the injury, and the railroad was liable, although the negligence of the fellow servants of the fireman in failing to close the switch contributed to the accident.

Injury to Hand Loading Vessel—Defective Rope and Failure of Fellow Servant to Warn.—In *Lowndes v. The Phoenix* (D. C.), 34 Fed. Rep. 760, it appeared that a vessel taking in a cargo of cotton was in full charge of a stevedore, who furnished all the hands. It was the duty of one of these to warn the men below when the cotton was on the way, but he failed to do so, and a sling breaking, one of the bales fell down the hatchway and struck a hand, who was employed to stow cotton, that the immediate cause of the accident was the condition of the rope of which the sling was made, which was old, that it was the duty of the ship to supply these things, and to see that they were in good condition. It was held that as the negligence of the ship was the immediate cause of the accident, the fact that the negligence of a fellow servant contributed thereto was not matter in discharge.

Collision—Failure to Give Sufficient Order for Running of Extra Train and Failure of Fellow Servants to Station Signal Men at Certain Distance from Work Train.—In *Louisville, etc., R. W. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988, it appeared that deceased was employed by defendant on a work train as a fireman on a pile-driver, that on the day he was injured such train was ordered to work extra at certain points on the road, and on its return, while running backward, it collided with an extra freight train, and the death of plaintiff's intestate was the result of the collision; and that both trains were moving under the orders of defendant, and neither had notice or knowledge of the other. It was held that the proximate cause of the collision was defendant's failure to give a sufficient order for the running of the extra freight train, although the work train may have violated a rule requiring it to keep a man before and behind it at certain distances with danger signals.

Collision—Negligence in Ordering Trains to Meet at Such a Place—Negligence of Fellow Servants in Operating Other Train without Headlight.—In *Mexico Cent. Ry. Co. v. Glover* (C. C. A.), 107 Fed. Rep. 356, it appeared that a fireman on a north-bound train was injured in jumping from his engine to escape the effect of an impending collision with a south-bound train standing on the main track at a blind siding, where the trains had been ordered to meet; that the night was dark, and the engine in front of him was without a head-

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light or signal lamps, and the wind was blowing sand and snow across the track; and that the siding was without a telegraph station or a signal house by which it could be recognized, and it was a fair inference from the evidence that there was no signal light at the meeting point. It was held that the negligence causing the collision was attributable to the railroad, in ordering the trains to meet at such a place though it occurred with negligence of the fireman's fellow servants, the conductor and engineer of the south-bound train, in operating it without lights.

Fall from Staging—Unfastened Plank Substituted by Fellow Servant for Nailed One—Mislead by Foreman.—In *Heckman v. Mackey*, 35 Fed. Rep. 353, it appeared that an employee, under the directions of a foreman, put up a staging, firmly nailing the two planks which constituted the floor, so that he could go upon it in doing the work; that, during his absence, another workman, under directions of the foreman, removed one of the planks, placing another in its place, without fastening it; and that plaintiff, not knowing that any change had been made, returned to his work on the staging, which let him fall to the ground. It was held that the proximate cause of the accident was the act of the foreman in misleading plaintiff into danger, and not the failure of the fellow servant to nail the plank which replaced the nailed one.

Bridge Rendered Dangerous by Storm—Negligence of Conductor in Ordering Train Ahead When Chargeable with Notice of Danger and Engineer's Disregard of Bridge Danger Signal—Question for Jury.—In *Union Pac. Ry. Co. v. Callaghan* (C. C. A.), 56 Fed. Rep. 988, it appeared that under the rules of defendant railroad, in case of an extraordinary storm, trains were required to stop before crossing bridges, until a man had been sent forward to inspect them; that conductors were required at all stopping places, and, when thought advisable, to make extra stops to ascertain the extent and severity of storms, taking no risks; that the conductor and engineer of a train sent out to repair a railroad after a heavy storm knew of the dangerous condition of the roadbed; and that a section foreman signaled the train to stop, in order to give information of the dangerous condition of a bridge, and the engineer slowed down, whereupon the conductor signaled him to go ahead, and the train proceeded at 15 miles an hour, without receiving the section foreman's information, ran upon the bridge, disregarding a danger signal placed thereon, and plaintiff, who was riding thereon, and with respect to whom the conductor was a vice principal and the engineer a fellow servant, was injured. It was held that it could not be said as a matter of law that the engineer's negligence in disregarding the danger signal interrupted the sequence between the negligence of the conductor in ordering the train ahead without obtaining the section foreman's information and the injury complained of and whether the conductor's negligence was the proximate cause of the injury was properly left to the jury.

C. FELLOW SERVANT'S NEGLIGENCE PROXIMATE CAUSE —MASTER NOT LIABLE.

Some of the authorities state that where a servant is injured, and both his master and his fellow servant were guilty of negligence which may have contributed to the injury, the master is not liable if the negligence of the fellow servant was its proximate cause. See the following decisions:

United States.—*Little Rock & M. R. Co. v. Barry*, 28 C. C. A. 644, 84 Fed. Rep. 944.

California.—*Kevern v. Gold & Silver Min. Co.*, 70 Cal. 392, 11 Pac. 740; *Trewatha v. Buchanan Gold Min. & Mil. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561.

Illinois.—*Chicago, R. I. & P. Ry. Co. v. Becker*, 38 Ill. App. 523.

Indiana.—*New York, etc., R. Co. v. Perriguet*, 138 Ind. 414, 34 N.

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E. 233, 37 N. E. 976; *Cole Bros. v. Wood*, 11 Ind. App. 37, 36 N. E. 1074; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 33 N. E. 795.

New York.—*Harvey v. New York Cent. & H. R. R. Co.*, 88 N. Y. 481, 8 Am. & Eng. R. Cas. 515; *Mahoney v. Vacuum Oil Co.*, 76 Hun 579, 28 N. Y. Supp. 196.

Texas.—*Mexican Nat. Ry. Co. v. Mussette*, 86 Tex. 708, 26 S. W. 1075; *Rose v. Gulf, C. & S. E. R. Co. (Tex.)*, 17 S. W. 780.

West Virginia.—*Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285.

Wisconsin.—*Fowler v. Chicago & N. W. Ry. Co.*, 61 Wis. 159, 21 N. W. 40; *Pease v. Chicago & N. W. Ry. Co.*, 61 Wis. 163, 20 N. W. 908.

1. Illustrations.

Collision between Trains—Failure to Notify as to Position or Approach of Trains—Failure to Send Out Flagman, and Place Torpedoes.—In *Little Rock & M. R. Co. v. Barry*, 28 C. C. A. 644, 84 Fed. Rep. 944, it appeared that the engineer of an extra passenger train was injured by reason of a collision of his train with the rear end of a delayed freight train, of whose position he had not been notified; and that the employees of the freight train had failed to observe the company's rules, requiring them, in case of stoppage, to send out a flagman, and place torpedoes on the track. It was held that if it were negligence on the part of the railroad not to notify him of the position of the freight train, or not to notify them in charge of the freight train of the approach of the extra passenger train, still the proximate cause of the accident was the negligence of his fellow servants in charge of the freight train.

Collision—Injury to Fireman—Failure of Engineer to Stop at Certain Point and His Neglect to Put Handlamps in Defective Headlight.—In *New York, etc., R. Co. v. Perriguet*, 138 Ind. 414, 34 N. E. 233, it appeared that an engineer was in charge of an engine he was required to operate with a defective headlight; that he had special orders to stop at S., and remain until a certain engine passed; that after leaving S. two and three-quarter miles, and having observed the approach of the other engine, he stopped his engine when one and a quarter mile distant from the other engine, there being upon the front of his engine two green lights burning brightly, and on board were handlamps to be lighted and placed in the headlight when it failed, for any reason, which, when placed in the headlight, could be seen for the distance of five miles, but on this occasion they were not so placed, and no headlight was burning; that from S. eastward the track was straight and free from obstruction, with a decline in the grade for four miles; and that the other engine came from the east at the rate of thirty miles an hour, and her engineer and fireman having looked but failed to observe the stationary engine, collided with it, thereby injuring its fireman. It was held that the proximate cause of the accident was the negligence of the engineer of his train, his fellow servant, in not obeying the order to remain on the side-track at S. until the other engine passed, and in failing to place the lighted handlamps in the headlight, and not the failure of the railroad company to furnish a proper headlight.

Injury to Brakeman—Defective Engine Tank Unfastened through Negligence of Another Brakeman in Causing Collision.—In *Vizelich v. Southern Pac. R. Co.*, 126 Cal. 587, 59 Pac. 129, it is held that where a brakeman in a railroad yard, while riding on a switch engine, is crushed by a water-tank of the engine, which became unfastened by reason of a collision caused by the negligence of another brakeman, his fellow servant, in manipulating a switch the proximate cause of the injury was such brakeman's negligence, and not any defect that might have been in the fastening of the water-tank, and therefore, there could be no recovery against the common master, the railroad company.

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Derailment—Jolting of Hand-car Caused by Defective Handles, and Negligence in Placing Cask upon It.—In an action by a railroad employee against the company for personal injuries, it appeared that a water cask placed on the front of a hand-car was jolted off, causing the overturning of the car and injury to such employee, a section-man; that the cask was placed there by one of the sectionmen, the foreman giving no further directions than that they should place their things on the car preparatory to returning from work; and that there was no particular place where they were accustomed to place it, but that it was sometimes put in one place and sometimes in another. It was held that, though the looseness of the car handles caused it to jolt, and though the foreman had promised to have this remedied, a verdict was properly directed for defendant as the accident resulted from the intervention of a new and distinct cause, which was the negligent placing of the cask by plaintiff's fellow servant. *Rose v. Gulf, C. & S. F. R. Co.* (Tex.), 17 S. W. 780.

Injury to Conductor—Collision between Sections of Train—Section Set in Motion by Fireman—Engine Abandoned by Engineer in Violation of Rules.—In *Mexican Nat. Ry. Co. v. Mussette*, 86 Tex. 703, 26 S. W. 1075, it appeared that a train ascending a steep incline was halted; that an engine was at front and rear of train; that the one in front was detached and sent forward for assistance; that the engineer at the rear, upon the stoppage of the train, left his engine and went to the front, and while he was absent the fireman set the engine in motion, and the train was moving down, and the conductor, in trying to stop the train, was thrown off and injured; that it was against the rules of the company for the engineer to leave his engine; and that great care was necessary in making the ascent. It was held that there was ground for the jury finding that the injury resulted proximately from the engineer leaving his engine.

Injury to Car-coupler—Failure to Repair Chains Connecting Lever with Draw-bar and Negligence of Engineer in Starting Train without Signal.—In *Pease v. Chicago & N. W. Ry. Co.*, 61 Wis. 163, 20 N. W. 908, it appeared that the chains connecting the lever with the draw-bar were frequently broken so that it was necessary to go between the platform to uncouple the cars; and that while a brakeman was so engaged, the conductor, not knowing his position, signaled the engineer to go ahead, and the train in starting injured the brakeman. It was held that the negligence of the conductor in starting the train without a signal from the brakeman, and not failure to have the chains repaired so that the cars could be uncoupled with the lever, was the proximate cause of the accident.

Accumulation of Fire-damp in Mine—Fellow Servant Using Lighted Lamp Instead of Safety-lamp.—In *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, it is held that where it appears that the owner of a coal mine was negligent in allowing fire-damp to accumulate in their mine, which will not cause injury until ignited, and it was ignited by a fellow servant, who went into the mine with a lighted lamp instead of a safety-lamp, contrary to his master's orders, and another servant was injured by the consequent explosion, the master cannot be held responsible, the immediate cause of the accident being the negligence of a fellow servant.

Injury to Miner—Defectively Constructed Mine Shaft and Negligence of Fellow Servant in Throwing Timber into Shaft.—In *Kevern v. Gold & Silver Min. Co.*, 70 Cal. 392, 11 Pac. 740, it appeared that plaintiff was an employee in defendant's mine; that the shaft of the mine was divided by a frame-work of posts into two compartments, one of which was provided with a ladder-way for the use of the employees; that plaintiff, while ascending the ladder, was struck by a timber negligently thrown by his fellow servant into the shaft. It was held that the employer was not liable, although the partition between the compartments may have been defectively constructed or

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insufficient in other particulars, as the proximate cause of the accident was the negligence of a fellow servant.

Collisions between Sections of Train—Defective Coupling and Negligence in Management of Sections.—In *Richmond & D. R. Co. v. Tribble's Adm'r*, 97 Va. 495, 24 S. E. 278, it appeared that decedent was riding with another brakeman upon the rear section of a train which had parted because of defective couplings, that after the train parted, the sections ran for five miles before the collision, a part of the distance being over an ascending grade; that the section upon which decedent was riding was properly supplied with brakes, and could have been stopped; and that the engineer failed to keep his train in motion, as required by a rule of defendant, until he knew the rear section had been stopped. It was held that the proximate cause of the collision was either the negligence of decedent or his fellow brakeman in failing to stop the rear section, or the negligence of the engineer in stopping the first section before he knew the rear section had stopped, and not the defective couplings, and therefore, as matter of law, the railroad was not liable.

A. R. Y.

BAKER'S ADM'R v. LEXINGTON & E. RY. CO.

(Court of Appeals of Kentucky, Oct. 10, 1905.)

[89 S. W. Rep. 149.]

Master and Servant—Death of Servant—Employment—Evidence.*
—Deceased, who was foreman of a day railroad gravel dump crew, was requested by the foreman of the entire day crew to tell the night dump crew to do some drilling ahead of the steam shovel, and for this purpose deceased returned to the gravel pit after the expiration of his hour of service in company with the foreman of the night crew, and was asked by the latter to light certain lamps on the caboose, after which deceased was killed by the caving of the embankment while between the steam shovel and the wall of the pit. Held, that the message given deceased in reference to the drilling and the night foreman's request that he light the lamps was not evidence that deceased was in defendant's employment at the time he was killed.

Same—Voluntary Exposure to Danger.—Where, in an action for the death of a servant by the caving of a railroad gravel pit, there was no proof that it was necessary or proper in the performance of deceased's employment to have placed himself between the steam shovel and the wall of the pit where he was killed, defendant was not liable therefor.

Appeal from Circuit Court, Clark County.

"Not to be officially reported."

Action by James Baker's administrator against the Lexington & Eastern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. Smith Hays and Leland Hathaway, for appellant.

Beckner & Jouett, for appellee.

*For the authorities in this series on the question who are, and are not, employees of a railroad company, see foot-notes appended to *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253; foot-notes appended to *Atlanta & W. P. R. Co. v. West* (Ga.), 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548.

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NUNN, J. The appellant instituted this action to recover damages of the appellee for the alleged negligent killing of his intestate by placing him in a dangerous and unsafe place to work, and that it knew, or by the exercise of ordinary care could have known, of its dangerous and unsafe condition. The appellee answered, controverting the petition. Upon the trial the appellant introduced his evidence, and on motion of appellee the court gave a peremptory instruction to the jury to find for the appellee. Of this appellant complains.

Baker was killed by the caving in of a bank of earth at a steam shovel which was being operated by the appellee on its road between Winchester and Clay City. The shovel was working on the north side of the track; that is, on the left side as one goes toward Clay City. The shovel was mounted on trucks, and was moved along the rails like any other car. This track upon which the shovel was moved was a temporary track, and was extended as the shovel removed the earth in front of it. This shovel also removed the earth for a space of about 12 or 15 feet to the left of this temporary track, and by means of a crane the dirt was swung around and dumped into cars on the loading track on the right side of the shovel. The embankment on which the shovel was working was 18 or 20 feet high, but the shovel would not reach up to a greater height than 12 or 15 feet, thereby at times leaving a projection out over the wall of the embankment. At the time Baker was killed he was situated between the car upon which the shovel was located and this embankment. The purpose for which he was there, if he had any purpose, was not shown by the evidence; nor was it shown that any workman had any business between this car and the embankment at any time; nor was it shown by the proof that any one in charge of the crew of hands, or any member of the crew, had any knowledge or information that Baker was situated there. The proof also shows that Baker was not a member of the shovel crew, but that he was foreman of the dumping crew, which hauled the dirt to a trestle about three miles from that place in the direction of Winchester, near the residence of the deceased. This shovel worked continuously; appellant's intestate belonging to the day crew, working from 6 to 6. It was the custom of the deceased, after his day's work was done, to ride down on a load of dirt to this trestle. On this occasion it was necessary for the engine of the work train to be run to Clay City for water and coal for the night run, and the deceased went with the engine on this trip. While at Clay City he was told by one Hutchison, the foreman of the entire day crew, to tell the night dump crew to do some drilling ahead of the shovel. He returned with the engine to the shovel in company with one Roberts, the foreman of the entire night crew. Roberts testified that upon their arrival, and when near the caboose, Baker asked him if there was anything he could do for him, and he answered and told him, "No, not unless he would light the lights on the caboose." This was 8 or 10 minutes before he was killed, and was the last seen of him by Roberts. One or

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two of the members of the night dump testified that, about two or three minutes before he was killed, they met him on the south or right side of the shovel, between it and the loading track, when he delivered the message from Hutchison with reference to the drilling. This was the last seen of him before he was killed, at about 7 o'clock p. m.

Appellant contends that the message given him by Hutchison with reference to drilling, and that which took place between him and Roberts with reference to lighting the lamps, was some evidence of deceased's employment and being in the service of appellee at the time he was killed. We cannot agree with this contention; but, admitting it to be correct, still the appellant cannot recover, for there was not a scintilla of proof showing that it was necessary or proper, in the performance of such employment, to have placed himself in the situation he was at the time he was killed.

Wherefore the judgment is affirmed.

WESTERN RY. OF ALABAMA v. RUSSELL.

(Supreme Court of Alabama, June 30, 1905.)

[39 So. Rep. 311.]

Appeal—Assignments of Error—Brief of Appellant.—A brief of appellant, which asserts that he insists on the assignments of error that the court erred in overruling demurrers to the complaint, and refers the court to the assignments of error and the demurrers as set forth in the record, amounts to no such insistence as makes it the duty of the court to review the assignments.

Master and Servant—Death of Railway Employee—Complaint—Sufficiency.—A complaint, in an action against a railway company for the death of an engineer due to a defective roadbed, which alleges in different counts that the negligence of the company consisted in the failure to maintain the track in proper condition, and that a culvert was defectively constructed, in that it was too small to carry off water during heavy rains, and in that the materials of which it was constructed had become weakened by decay, sets forth a cause of action in each count.

Appeal—Harmless Error.—The error in sustaining a demurrer to a plea is harmless, where defendant has the benefit of the facts alleged under the general issue.

Master and Servant—Death of Employee—Answer—Sufficiency.—Where the complainant in an action against a railroad company for the negligent death of an engineer, due to a defective roadbed, alleges that the company negligently failed to warn decedent of the conditions of the roadbed, a plea that decedent's death resulted from a washout occasioned by a rainfall so heavy as to amount to an act of God is insufficient.

Same—Railways—Duty to Warn Trainmen.*—It is the duty of a

*For the authorities in this series on the subject of the duty of a railroad company to warn and instruct its employees, see foot-notes appended to *Crane v. Chicago, etc., R. Co.* (Iowa), 14 R. R. R. 842, 37 Am. & Eng. R. Cas., N. S., 842; *Meehan v. Holyoke St. Ry. Co.* (Mass.), 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; *Rogers*

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railway company to give warning to trainmen having no duties to perform in regard to the proper maintenance of the track or dangers therein, and they have a right to assume that the track is in a safe condition.

Same—Death of Employee—Contributory Negligence—Plea—Sufficiency.—A plea, in an action against a railway company for the death of an engineer occasioned by a defective roadbed, which alleges that decedent was notified that there had been heavy rains along the line of railway, and was cautioned to look out for high water at waterways, but which fails to allege that the engineer was informed of the dangerous conditions existing at the place of the accident, or that, had he kept a lookout, he could have discovered the danger in time to avoid the accident, fails to allege contributory negligence.

Same.—An averment that an engineer so negligently operated his engine and train as to run into a washout, which could have been avoided by the use of ordinary care, is a conclusion of the pleader, and does not show contributory negligence on his part, precluding a recovery for his death.

Same—Duty of Railway Engineer to Examine Track.—A railway engineer, who received notice that there had been a heavy rainfall along the company's line, and who was cautioned to look out for high water at waterways, was not required, in order to relieve himself from the charge of contributory negligence, precluding a recovery for his death occasioned by his running into a washout, to do more in the examination of the roadways or waterways than might be done consistently with the performance of his duties as engineer.

Same—Injury to Railway Engineer—Contributory Negligence.—A railway engineer, who knew the locality where an accident occurred resulting in his death, but who was not informed of any conditions existing at that place at the time, was not guilty of contributory negligence because he failed to exercise greater care at that place than at other like places.

Same—Assumption of Risk—Plea.—A plea, in an action against a railway company for the death of an engineer occasioned by a defect in the roadbed, which alleges that the injury occurred immediately after an excessive rainfall on the company's line, that decedent "knew this fact and also knew the condition of" the company's roadbed at the place of the accident, and that with such knowledge he voluntarily undertook to operate an engine and train, does not show that he assumed the risk of injury due to a defective culvert in the roadbed, rendered defective by the rain, because it fails to allege what "condition" decedent knew, or that he knew of any conditions rendering the track dangerous.

Same—Risk Assumed.†—Before a railway engineer operating an engine and train assumes the risk of injury resulting from a defect in

v. Cleveland, etc., Ry. Co. (Ill.), 14 R. R. R. 846, 37 Am. & Eng. R. Cas., N. S., 846; Weed v. Chicago, etc., Ry. Co. (Neb.), 13 R. R. R. 797, 36 Am. & Eng. R. Cas., N. S., 797; Tennessee Coal Iron & R. Co. v. Jarrett (Tenn.), 13 R. R. R. 589, 36 Am. & Eng. R. Cas., N. S., 589.

†For the authorities in this series on the question whether trainmen assume the risks from defective tracks, see foot-note appended to *Northern Ala. Ry. Co. v. Shea (Ala.), 14 R. R. R. 514, 37 Am. & Eng. R. Cas., N. S., 514.*

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by railroad employees, see foot-note appended to *Woods v. Northern Pac. Ry. Co. (Wash.), 15 R. R. R. 365, 38 Am. & Eng. R. Cas., N. S., 365; Foster v. Chicago, etc., Ry. Co. (Iowa), 14 R. R. R. 538, 37 Am. & Eng. R. Cas., N. S., 538; Chicago, etc., Ry. Co. v. Barnes (Ind.), 14 R. R. R. 531, 37 Am. & Eng. R. Cas., N. S., 531; Murphy v. New York, etc., R. Co. (Mass.), 14 R. R. R. 346, 37 Am. & Eng. R. Cas., N. S., 346;*

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the roadbed occasioned by a heavy rainfall, it must appear either that he was warned of the danger or that it was open.

Same—Contributory Negligence—Plea.—A plea, in an action against a railway company for the death of an engineer occasioned by a defect in a culvert in the roadbed caused by an excessive rainfall, which alleges that decedent was notified by the company before he reached the place of the accident that there had been heavy rains at that place, and was cautioned to look out for high water at that place, and that nevertheless he, with full knowledge of the location, negligently failed to approach the place with caution, but negligently ran his train over the same at a high rate of speed, does not show contributory negligence on his part, because it fails to allege that he failed to look out for high water, or that, if he had done so, he could have seen the dangers, and the averment that he had full knowledge of the location is not an allegation that he knew that the culvert was defective.

Same—Assumption of Risk—Plea.—A plea, in an action against a railway company for the death of an engineer occasioned by a wash-out, which alleges that the injury occurred immediately after an excessive fall of rain on the line of railway, that decedent was notified thereof and was cautioned to look out for high water at the place of the accident, and that he with such knowledge voluntarily undertook to run an engine and train over the place, does not show that he assumed the risk; there being no facts showing that the danger was obvious or that decedent knew the defect.

Same—Demurrer to Special Plea.—In an action against a railway company for the death of an engineer, occasioned by a defect in the roadbed, the company pleaded the general issue to the complaint charging negligence. It also pleaded that the injury complained of was the result of mere accident. Held, that a demurrer to the latter plea was properly sustained, as the fact stated therein was provable under the general issue.

Death by Wrongful Act—Set-Off—Statutory Provisions.—Under Code 1896, § 27, providing that in actions for death by wrongful act the damages recoverable are not subject to the payment of the liabilities of the decedent, a railway company, when sued for the negligent death of an engineer occasioned by a defect in the roadbed, cannot set off damages to its cars by reason of decedent's negligence.

Master and Servant—Injury to Employee—Complaint—Answer.—Where the complaint, in an action against a railroad company for the death of an engineer occasioned by a defect in the roadbed, alleged the negligent failure of the company to give warning to decedent of the dangerous condition existing where the injury occurred, a plea which alleged that the company's servants did not know of the conditions in time to give warning was bad for failing to show that the company had made efforts to inform itself.

Same.—Where, in an action against a railway company for the death of an engineer occasioned by a defect in the roadbed, the complaint alleged that the company was negligent in failing to warn decedent of the dangers, and the company pleaded the general issue, so that evidence showing that it was not negligent was admissible, the question of the sufficiency of a plea alleging that the company's servants did not know of the defect in time to give warning was immaterial.

Bill of Exceptions—Signing—Extension of Time—Validity of Order.—An order extending the time for signing the bill of exceptions, made by the court and not by the judge, is not valid.

Foster v. New York, N. H. & H. R. Co. (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343; Meehan v. Holyoke St. Ry. Co. (Mass.), 14 R. R. R. 331, 37 Am. & Eng. R. Cas., N. S., 331; Shaw v. Manchester St. Ry. (N. H.), 14 R. R. R. 275, 37 Am. & Eng. R. Cas., N. S., 275.

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Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Annie Russell, as administratrix of Thomas J. Russell, deceased, against the Western Railway of Alabama. From a judgment for plaintiff, defendant appeals. Affirmed.

George P. Harrison, for appellant.

Crum & Weil and *J. M. Chilton*, for appellee.

TYSON, J. This action is by the personal representative of Thomas J. Russell, deceased, to recover damages for alleged negligence on the part of defendant resulting in his death. The complaint as originally filed comprised six counts, and nine others were added by amendment. Counts 8 and 10 were withdrawn, and the trial was had on the remaining counts. To each count a demurrer was interposed, which was overruled by the trial court. These several rulings are assigned as error. There is, however, no such insistence in brief of appellant's counsel on these assignments of error as devolves upon us the duty of passing upon them. All that is said is that they are insisted on, and we are referred to the assignments of error, and the demurrers as set forth in the record. This amounts to no insistence. *Williams v. Spragins*, 102 Ala. 424, 431, 15 South. 247; *Ward v. Hood*, 124 Ala. 574, 27 South. 245, 82 Am. St. Rep. 205; *Syllacauga Land Co. v. Hendrix*, 103 Ala. 254, 15 South. 594; 2 Mayfield's Dig. p. 133, § 77 et seq.

We have, however, examined each count of the complaint upon which the case was tried, and find that each states a cause of action. In some of the counts the negligence is alleged in general terms to have consisted in the failure to maintain the track in proper condition for the passage of trains; in others, that the culvert was defectively constructed; in others, the defect in the construction of the culvert is stated more specifically to have consisted in the fact that it was too small to carry off the water that would accumulate during heavy rains; and in others, that the materials of which the culvert was constructed had become weakened by decay. There were also two counts (seventh and eighth) predicated on the alleged failure of the servants of defendant to give warning to plaintiff's intestate of the conditions as they existed at the time of the disaster.

The defendant filed originally 12 pleas, and a like number were added by amendment. Of these, 1 was the general issue, and 2, 3, 4, 5, 13, 14, 15, and 16, to which demurrers were sustained, set up in different forms that the washing away of the culvert and the death of Russell resulted from a rainfall so severe and unexampled in character as to amount to the "act of God." Without considering the various grounds of demurrer interposed to each of these pleas, suffice it to say that, if they presented a defense to the action and, therefore, the court erred in sustaining the demurrer, the defendant could have had the benefit of each of them under the plea of the general issue. The rulings must therefore be regarded as innocuous. *Louisville &*

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N. R. Co. v. Hall, 131 Ala. 161, 32 South. 603. But, aside from this, they were clearly no answer to the seventh count.

Pleas 7, 8, 9, 11, 21, 22, and 23 invoke either the defense of contributory negligence, or that plaintiff's intestate assumed the risk of the injury which caused his death. Plea 7 is as follows: "That before plaintiff's intestate sustained the injury complained of as alleged in said complaint, and while in charge of said train, he was notified by defendant that there had been heavy rains along the line of defendant's railway, and was cautioned to look out for high water at all low places and waterways; that notwithstanding said notification and caution, and in disregard thereof, the said intestate so carelessly and negligently operated said engine and train as to run into a washout, which could have been avoided by the use of reasonable care and diligence. Wherefore defendant avers the injury complained of was the result of the careless and negligent conduct of plaintiff's intestate in disregard of such notice and caution in operating said engine and train, thereby contributing to his own injury, and that such careless and negligent conduct was the proximate cause of the injury complained of."

Speaking of the duties railway companies owe their employees operating their trains, we said, in *Northern Ala. Ry. Co. v. Shea*, 37 South. 796: "Trainmen do not assume the risk of defective track conditions. They have a right to assume that the track is safe. It is not their duty, but the duty of their employers, to keep it in proper condition. The acquaintance which trainmen are required to have with the premises, and to acquire which they are carried over the road on trains before being put in charge of trains, is more an acquaintance with the line, so to say, than with the track. They must know, and in the way indicated they are taught, the conditions of the line in respect of stations, stopping places, switches, grades, curves, and distances. With these things they have to do; but not with the track itself in respect of its condition and maintenance. This plaintiff, a brakeman, was not charged with knowledge of the defects in this track, but, on the contrary, had a right to assume without investigation that the track was in good and safe condition." The same principle was also declared in *L. & N. R. R. Co. v. Baker*, 106 Ala. 624, 17 South. 452; *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 457, 16 Sup. Ct. 618, 40 L. Ed. 766. For a failure to discharge these duties, the defendant could not relieve itself by any such general notification or caution as is alleged in the plea. In *Dresser on Employer's Liability Act*, § 99, it is said: "The master does not discharge the duty cast upon him by giving a general warning of danger, but he is bound so to point out and instruct about the risk that the servant may appreciate what he is to encounter, and know how he may avoid it. Mere information in advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of danger which would necessarily attend the actual performance of his work."

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It is true the statement quoted relates to the duty imposed upon the master to give warning of latent dangers or to inexperienced servants in respect to the appliances with which they have to do. But certainly the duty of the employer would not be less in respect to trainmen who had no duties to perform regarding the proper maintenance of the track. It is not alleged that the engineer was informed of the dangerous conditions existing at the culvert, or that, had he kept a lookout, he could have ascertained those conditions in time to have averted the injury. The averment that he so carelessly and negligently operated his engine and train as to run into a washout, which could have been avoided by the use of ordinary care and diligence, is the mere statement of the conclusion of the pleader, and is not permissible in pleading contributory negligence, where the facts must be averred. *S. R. Co. v. Shelton*, 136 Ala. 191, 34 South. 194; *Railroad Co. v. Herndon*, 100 Ala. 451, 14 South. 287; *L. & N. R. R. Co. v. Markee*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21. The court did not err in sustaining the demurrer.

Plea 8 was substantially the same as 7, with the added averment "that notwithstanding said notification and caution, and in disregard thereof, the said intestate carelessly and negligently ran his said train at a rapid rate of speed, without ascertaining the condition of the road ahead of him, which he could have done by the use of proper care and diligence," etc. It will be seen that the plea is open to the same criticism as the seventh. It was not the duty of the engineer, on any such general notice, to do more in the way of examination of the roadways or waterways than could be done consistently with the performance of his own duties as engineer; and there is no averment that, consistently with the performance of his own duties, he could have discovered the situation at the point where he was injured.

Plea 9 was the same as 7 and 8, with the added averment that the deceased, "well knowing the location at the place where it is alleged he was injured, and that it was a waterway, negligently and carelessly failed, before attempting to run his said engine and train thereover, to ascertain the condition of the track or roadway over said waterway." The added averment falls far short of correcting the defects pointed out in the former pleas. The only fact added, as imposing upon the engineer the duty of examining the road at the place where he was injured, is "that he well knew the locality." There is no averment that he knew or was informed of any conditions existing at the place at the time that required greater care on his part than at other waterways.

Plea 11 invokes as a defense the assumption of risks. It is alleged "that the injury complained of occurred immediately after a very heavy and excessive fall of rain on the line of defendant's railway, the plaintiff's intestate knew this fact and also knew the condition of defendant's roadway at said place, and with such knowledge voluntarily undertook to operate said engine and train at said time and place, and thereby assumed the risk of the

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injury which resulted in his death.” Whether deceased knew of the condition of defendant’s roadway at said place, as those conditions existed at the time he attempted to cross, the plea does not aver. Construing its averment most strongly against the pleader, he possessed only such knowledge of its conditions as he had previously acquired. It does not appear what “condition” deceased knew, and there is an evident failure to allege that he knew of any conditions existing at the time that made it dangerous to cross with his engine and train. Before it could be said he assumed the risk, it must appear either that he was properly warned of the danger or that it was open and patent. *L. & N. R. R. Co. v. Stutts*, 105 Ala. 368, 17 South. 29, 53 Am. St. Rep. 127; *L. & N. R. R. Co. v. Baker*, 106 Ala. 624, 17 South. 452; *A. G. S. R. R. Co. v. Brooks*, 135 Ala. 401, 33 South. 181, and authorities there cited.

Plea 21 alleges that “plaintiff’s intestate was guilty of contributory negligence in that before he had reached the place where he was injured he was notified by the defendant that there had been very heavy rains at the place where the injury occurred, and cautioned to look out for high water at said place; that notwithstanding said notification and caution, which was given in ample time for said intestate to have acted thereon, and in disregard thereof, he (plaintiff’s intestate, with a full knowledge of the location where said injury occurred, negligently failed to approach said place with caution, but negligently and carelessly ran his engine and train over the same at a high rate of speed,” etc. It will be observed it is not alleged that plaintiff’s intestate failed “to look out for high water at said place,” or that, if he had done so, he could have seen the conditions that made it obviously dangerous to attempt to cross. The averment that he had “full knowledge of the location” is by no means the equivalent of an allegation that he knew the culvert had been washed out, or the dangerous condition caused by the stoppage of the water, or that he could have discovered the danger by the exercise of due care; and the failure to make these necessary averments is not remedied by the statement that deceased “negligently and recklessly ran his engine and train over the same at a high rate of speed”—a mere conclusion of the pleader which, as we have said above, is an insufficient averment in pleas of this character.

The twenty-second plea sets up contributory negligence, and is substantially the same as the seventh and eighth. It avers the same notification that heavy rains had fallen along the line of the defendant’s road, and the same caution to look out for high water at all low places and waterways. It is alleged that, notwithstanding said notification and caution, “said intestate carelessly and negligently ran his said engine and train at a rapid rate of speed, without ascertaining the condition of the road ahead of him, which he could have done by the use of the proper care and diligence, and which it was his duty to do before attempting to pass over the place where the injury occurred, Wherefore,”

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etc. What we have said in respect to the seventh and eighth pleas is applicable to this one. Furthermore, it is not alleged that he failed to keep a lookout, or that he could have maintained such a lookout, consistently with his other and primary duties, as would have enabled him to ascertain the conditions then existing, and, finally, the breach of duty is alleged by way of conclusion merely.

The defense of the assumption of the risk was invoked by the twenty-third plea, which alleged that "the injury occurred immediately after a very heavy and excessive fall of rain on the line of defendant's railway, and that plaintiff's intestate was notified in ample time by defendant of this fact, and, further, that plaintiff's intestate was cautioned to look out for high water at said place, and defendant avers that it was the duty of plaintiff's intestate after receiving said notice not to have crossed said place without ascertaining that it was safe, and notwithstanding this notice and duty, and with such knowledge on his part, voluntarily undertook to run said engine and train of cars at a rapid rate of speed over said place, and thereby assumed the risk of injury which resulted in his death." This plea, it is evident is open to the objections urged to all the others of the same character. There are no facts stated showing that the danger was open to ordinary observation and known to deceased—necessary allegations before deceased could be said to have assumed the risk or even that he failed to keep a lookout. As a plea of the assumption of risk, it is nowhere averred that the danger was obvious. There is no distinct averment in either of the pleas that plaintiff's intestate knew of the dangerous conditions existing at the culvert when he attempted to pass, or that they were of so obvious a character that he could, consistently with the performance of his duties, have ascertained these conditions.

The demurrer to plea 10 was properly sustained. The plea alleges that the injury complained of was the result of a mere accident, incident to the work of which plaintiff's intestate was engaged. It is sufficient to say that, if the facts were true as stated, the defendant was not guilty of the negligence charged in the complaint and denied by the plea of the general issue. *Going v. Steel & Wire Co.* (Ala.) 37 South. 784; *Milligan v. Pollard*, 112 Ala. 465, 20 South. 620.

The averments of plea 12 are substantially the same as in pleas 7 and 8, with the added statement that as the result of the negligence of plaintiff's intestate the defendant sustained damage to its cars, etc., in a sum stated, which the plaintiff offers to set off against the demands sued for. As we have already shown, the averments of the plea do not sustain the charge of contributory negligence; but, if it were otherwise, the damages alleged to have been sustained could not be set off in an action of this character, where it is sought to recover damages for injuries alleged to have resulted from defendant's negligence. Code, 1896, § 27. In each of the cases cited, to the proposition by appellant, the action was in *assumpsit*.

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Plea "A" was interposed to the seventh count of the complaint, which alleges the negligent failure of the defendant to give warning to plaintiff's intestate of the dangerous conditions existing at the place where the injury occurred. The plea alleges that defendant's servants did not know of those conditions in time to give such warning. Whether the defendant had made any efforts to inform itself does not appear, and this failure to allege such effort was one of the grounds of demurrer interposed. *Robinson Mining Co. v. Tolbert*, 132 Ala. 462, 31 South. 519. Moreover, if the defendant was guilty of no negligence in failing to warn plaintiff's intestate, that fact could have been shown on issue joined to the seventh count of the complaint, which alleged such negligent failure. What has been said disposes of the rulings upon the pleadings.

The remaining assignments of error are predicated upon rulings which must be shown by a bill of exceptions. The paper in the record purporting to be a bill of exceptions must be disregarded, because the order of April 29, 1903, extending the time for its signing, was made by the court and not by the judge. *Western Ry. of Ala. v. Arnett* (Ala.) 34 South. 997; *Scott v. State* (Ala.) 37 South. 366.

Affirmed.

MCCLELLAN, C. J., and SIMPSON and ANDERSON, JJ., concur.

KANE v. ERIE R. CO.

(Circuit Court of Appeals, Sixth Circuit, December 12, 1904.)

[133 Fed. Rep. 681.]

Constitutional Law—Construction of State Constitution—Question for State Court.—The question of validity, under the Constitution of a state, of a state law, is one the determination of which properly belongs to the Supreme Court of that state.

Same—Presumptions.—Where the constitutionality, under a state Constitution, of a state law, is questioned in a federal court, and the matter has never been determined by the Supreme Court of the state, and its lower courts are divided on the question, the weight of their authority being in favor of the constitutionality of the act, every possible presumption should be indulged in favor of its validity until its invalidity is shown beyond a reasonable doubt.

Master and Servant—Injuries to Servant—Fellow Servants.*—Prior to the passage of 87 Ohio Laws, p. 150, § 3, a railroad was not responsible to an employee for injuries resulting from the negligence of a fellow servant, except where one employee was put under the control of another, in which case the railroad was liable to the former for injuries caused by the negligence of the latter when both were acting in the common service.

Constitutional Law—Equal Protection of Laws—Provisions of State Constitution.—Section 2 of the Bill of Rights of the Constitution of Ohio, providing that all political power is inherent in the people, and that government is instituted for their equal protection and benefit, is not less broad in its scope than the clause of the fourteenth amendment to the federal Constitution, providing that no state shall deny

*See extensive note appended to *Illinois Cent. R. Co. v. Elliott* (Ky.), 16 R. R. R. 145, 39 Am. & Eng. R. Cas., N. S., 145.

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to any person within its jurisdiction the equal protection of the law.

Same—Classification.—The General Assembly of a state, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on created classes, according to its view of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be a reasonable ground for the classification made.

Same—Basis of Classification.—A valid classification for legislative purposes must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any just basis. It must be grounded upon a reason of a public nature, and the act must affect all who are within the reason for its enactment.

Master and Servant—Fellow Servants—Legislation—Evasion of Law.—A railroad cannot evade the liability imposed upon it by 87 Ohio Laws, p. 150, § 3, providing that every person in the employ of a railroad, having power or authority to direct or control any other employee, is not the fellow servant, but a superior, of such other employee, and is also the superior of subordinate employees in any other branch of the service, by putting a dummy in nominal charge of every other employee on the train, but in such case the court will look through the evasion in order to determine the real grades of the service.

Constitutional Law—Equal Protection of Laws—Railroad Fellow Servants' Act.†—87 Ohio Laws, p. 150, § 3, which provides that in actions against a railroad for injuries to employees it shall be held, in addition to the liability now existing by law, that every employee having authority to direct any other employee is not a fellow servant, but superior, of such other employee, and also that every person having charge of employees in a separate branch or department shall be held the superior of subordinate employees in any other department, and which inereiy extends the classification previously made by the Supreme Court, under which a railroad was liable for injuries to an inferior caused by the negligence of a superior acting in the same service, by imposing on the railroad a liability for injuries caused to an inferior in one branch of the service by the negligence of a superior in another branch, is not repugnant to section 2 of the Bill

†For the authorities in this series on the subject of the constitutionality of employers' liability acts, see *Mexican Nat. R. Co. v. Jackson* (U. S.), 7 R. R. R. 259, 30 Am. & Eng. R. Cas., N. S., 259 (Laws of Tex. 1897 Sp. Sess. p. 14, defining liability for injuries to servants, not in violation of Const. of Tex., art. 3, § 35, as containing plurality of subjects); *In re Ten Hour Law for Street Ry. Corporations* (R. I.), 8 R. R. R. 610, 31 Am. & Eng. R. Cas., N. S., 610 (Rhode Island Pub. Laws, c. 1004, limiting hours of labor of certain street railway employees, is within police powers); *Kilpatrick v. Grand Trunk Ry. Co.* (Vt.), 4 R. R. R. 945, 27 Am. & Eng. R. Cas., N. S., 945 (constitutionality of statutes abrogating the doctrine of assumption of risk); *Southern Pac. Co. v. Schoer* (C. C. A.), 3 R. R. R. 254, 26 Am. & Eng. R. Cas., N. S., 254 (states may fix by legislative enactment the liabilities of employers for acts and negligence of their employees); note, 21 Am. & Eng. R. Cas., N. S., 925; note, 12 Am. & Eng. R. Cas., N. S., 702 (constitutionality of Kansas fellow servant act); note, 9 Am. & Eng. R. Cas., N. S., 816; note, 9 Am. & Eng. R. Cas., N. S., 9 (constitutionality of Iowa statute); note, 9 Am. & Eng. R. Cas., N. S., 97 (Massachusetts statute); *Indianapolis Union Ry. Co. v. Houlihan* (Ind.), 21 Am. & Eng. R. Cas., N. S., 915 (constitutionality of employers' liability act of Indiana); *Powel v. Sherwood* (Mo.), 22 Am. & Eng. R. Cas., N. S., 53 (Mo. Laws 1897, p. 96, employers' liability act, does not violate the Federal constitution by depriving the railroad company of property without due process of

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of Rights of the Constitution of Ohio, which provides that all political power is inherent in the people, and government is instituted for their equal protection and benefit.

Same—Policy of Law.—The validity of an act passed by the Legislature must be tested alone by the Constitution. Courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy.

In error to the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 128 Fed. 474.

T. McNamara, Jr., Geo. F. Arrel, and J. P. Wilson, for plaintiff in error.

Cushing & Clarke, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover damages for the wrongful death of the plaintiff's intestate, a fireman on a switching engine at work in the yards of the defendant company at Niles, Ohio, which resulted from a collision charged to have been due to the negligence of the engineer of another train, also at work in the yards. The suit could not have been maintained under the law as it stood in Ohio prior to the passage of the act of April 2, 1890 (87 Ohio Laws, p. 149), for under that law the negligence relied on was that of a fellow servant, for which the company was not liable. The suit, therefore, was based upon section 3 (page 150) of the act referred to, which reads as follows:

"Sec. 3. That in all actions against the railroad company for personal injury to, or death resulting from personal injury, of any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employees, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow servant, but superior of such other employee, also that every person in the employ of such company having charge or control of employees in any

law; nor is it class legislation); *Coley v. North Carolina R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 885 (constitutionality of statute preventing employees from waiving benefit of employers' liability act); *Pittsburgh, C. C. & St. L. Ry. Co. v. Montgomery* (Ind.), 9 Am. & Eng. R. Cas., N. S., 792 (Indiana statute); *Peirce v. Vandusen* (C. C. A.), 7 Am. & Eng. R. Cas., N. S., 1 (validity of state statute forbidding a railroad company from entering into any agreement with its employees whereby it shall be held not liable for injuries to such employees, and declaring such corporations liable for injuries by fellow servants); *Tullis v. Lake Erie & W. R. Co.* (U. S.), 16 Am. & Eng. R. Cas., N. S., 462 (constitutionality of statute making railroad liable for negligence of fellow servant); *Pennsylvania Co. v. Ebaugh* (Ind.), 14 Am. & Eng. R. Cas., N. S., 701 (Indiana act is constitutional); *St. Louis, I. M. & S. Ry. Co. v. Paul* (U. S.), 12 Am. & Eng. R. Cas., N. S., 755 (constitutionality of Arkansas statute requiring payment of wages of discharged employees).

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separate branch or department, shall be held to be the superior and not fellow servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

Several years ago the case was tried and judgment recovered, which was reversed by this court for reasons stated in the opinion delivered by Judge Cochran, and reported in *Erie Railroad Co. v. Kane*, 118 Fed. 223, 55 C. C. A. 129. No question was raised at that time as to the constitutionality of the act. We did pass upon its construction, holding that, under the second clause of section 3, an engineer, having control of but a single employee, might be the constructive superior of the fireman of another train having control of none. When the case came on again for trial below, objection to the introduction of any testimony was sustained on the ground, among other things, that the provisions of section 3 relied on violate the Constitution of Ohio. Whether this holding was correct is the question before us now for determination.

We approach the consideration of the validity, under the Constitution of Ohio, of an Ohio law, with some reluctance; for the question is one whose determination properly belongs to the Supreme Court of Ohio. *Pelton v. National Bank*, 101 U. S. 143, 144, 25 L. Ed. 901. Unfortunately, although the law has been in force for 14 years, and several times before the Supreme Court of Ohio (*R. R. Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11; *R. R. v. Erick*, 51 Ohio St. 146, 37 N. E. 128; *Railway Co. v. Shanower*, 70 Ohio St. 166, 71 N. E. 279), the validity of the provisions now assailed has yet to be determined by that tribunal. The lower courts of Ohio are divided on the question, the weight of authority being in favor of the constitutionality of the act. Under these circumstances, the well-settled rule that, where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and continues until the contrary is shown beyond a reasonable doubt, laid down by the Supreme Court of the United States and the Supreme Court of Ohio, is peculiarly applicable. *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496; *Railroad Co. v. Clinton Co.*, 1 Ohio St. 82, 83; *State v. Cincinnati*, 20 Ohio St. 33; *Marmet v. State*, 45 Ohio St. 64, 12 N. E. 463; *State ex rel. v. Jones*, 51 Ohio St. 492, 504, 37 N. E. 945.

Prior to the passage of this act the general rule in Ohio was that a railroad company was not responsible to an employee for injuries resulting from the negligence of a fellow servant, with the qualification, however, that where one employee was put under the control of another the company was liable to the former for injuries caused by the negligence of the latter, when both were acting in the common service. *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 416; *Railroad Co. v. Keary*, 3 Ohio St. 201. In the latter case Judge Ranney pointed out that the risk assumed on entering the employment of a railroad company is only that resulting from the carelessness of those engaged in a

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common employment, and said (page 211): "No service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other." So important was this Ohio rule, rendering a railroad company liable to a subordinate for injuries caused by the negligence of his superior, deemed to be, that it was held in the case of *Railway Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467, 58 Am. St. Rep. 833, that it was not competent for a company to stipulate with its employees that this liability should not attach. It was pointed out that the liability was not created for the protection of the employees simply, but had its reason and foundation in a public necessity and policy. Page 479, 44 Ohio St., page 470, 8 N. E., 58 Am. Rep. 833.

So it appears that, under the Ohio rule as it existed when this act was passed, the relation of the negligent to the injured employee determined the liability of the company. If the negligent employee was in control of the injured one, the company was held liable, because then the two were not deemed fellow servants, engaged in a common employment, but one was regarded as the superior of the other. Recognizing this ground of distinction as existing in Ohio, section 3 not only gives it statutory force, but extends the liability of the company by broadening the class of superiors in the service and narrowing that of fellow servants. It provides that in all actions against the railroad company, for personal injury or wrongful death, it shall be held, "in addition to the liability now existing by law"—

(1) "That every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow servant, but superior, of such other employee;" and,

(2) "Also that every person in the employ of such company having charge or control of employees in any separate branch or department shall be held to be the superior and not fellow servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

As said by Judge Davis in the recent case of *Railway Co. v. Shanower*, 70 Ohio St. 166, 169, 71 N. E. 279, 280:

"It [the act of April 2, 1890] declares that it is intended to add to the liability already recognized by law. It does this in two particulars: First, it makes obligatory upon the courts of this state the superior servant rule, which was first announced in this court in *Little Miami Railroad Co. v. Stevens*, 20 Ohio, 415, and which was afterwards approved and followed in a number of other cases in this and other states, although it has been repudiated in many others; second, it creates by force of the statute a relation of superior and subordinate where none exists in fact, and brings it within the operation of the rule mentioned."

The exercise of authority by one employee over another is thus made the test. Any employee who exercises authority over another is "not the fellow servant, but superior," of such other,

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and every employee who exercises authority over another in his own branch or department is "the superior, and not fellow servant," of an employee in a separate branch or department who exercises no authority there. If the negligent employee is, by virtue of this enactment, the superior, and not fellow servant, of the injured employee, the latter did not assume the risk of his negligence, and the company is responsible.

It is to be observed that the basis of the new classification made by the Legislature is none other than that of the old made by the Supreme Court of Ohio. The class is merely broadened by a logical extension of the rule. Under the old, the company was liable for the negligence of one who exercised authority over the employee injured through his negligence (*B. & O. R. R. Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233, 243); under the new, it is liable not only for the negligence of one who exercises authority over the employee injured, but of one who, exercising authority in one branch or department, by his negligence causes the injury of an employee in another who exercises no authority there.

The contention is that the act violates the second section of the Bill of Rights of the Constitution of Ohio, which provides that "all political power is inherent in the people; government is instituted for their equal protection and benefit;" and which, as held in the case of the State ex rel. *v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218, is not less broad than that clause of the fourteenth amendment, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the law." It is strongly urged that the statute, by conferring upon some employees a right to recover which is denied others, unjustly discriminates among those engaged in the same occupation, creating a favored class, and denying to those outside of it the equal protection of the law.

The doctrine is well settled that the General Assembly, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes, according to its views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made. *Wagoner v. Loomis*, 37 Ohio St. 571; *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672; *State ex rel. v. Jones*, 51 Ohio St. 492, 506, 37 N. E. 945; *State v. Nelson*, 52 Ohio St. 88, 101, 39 N. E. 22, 26 L. R. A. 317; *Cincinnati v. Steinkamp*, 54 Ohio St. 285, 290, 43 N. E. 490; *Hagerty v. State*, 55 Ohio St. 613, 45 N. E. 1046; *France v. State*, 57 Ohio St. 1, 25, 47 N. E. 1041; *State v. Gardner*, 58 Ohio St. 599, 606, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785; *State v. Guilbert*, 70 Ohio St. 229, 250, 71 N. E. 636; *Fidelity & Casualty Co. v. Freeman*, 109 Fed. 847, 855, 48 C. C. A. 692, 54 L. R. A. 680; *Missouri Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L.

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Ed. 585; *Chicago, Kansas & Western R. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; *Gulf, Colo. & Santa Fe R. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *St. Louis, Iron Mountain & Southern Ry. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746; *Tullis v. Lake Erie & Western R. R.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Billings v. Illinois*, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400.

Of the above cases, *Missouri Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Chicago, Kansas & Western R. R. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; and *Tullis v. Lake Erie & Western R. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192—sustain the validity of laws either abrogating or modifying the common-law rule of fellow servants as applied to railroad employees.

The sole question in the case, therefore, is whether the exercise of authority in the service affords a reasonable ground for the classification of railroad employees. A valid classification for legislative purposes "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colo. & Santa Fe R. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Billings v. Illinois*, 188 U. S. 97, 102, 23 Sup. Ct. 272, 47 L. Ed. 400. It must be grounded upon "a reason of a public nature," and "the act must affect all who are within the reason for its enactment." Judge Shauck in *Miller v. Crawford*, 70 Ohio St. 207, 214, 71 N. E. 631.

The court below based its holding that the act is unconstitutional upon the ground that the classification was wholly arbitrary; that there is no real distinction in the railroad service between an employee who exercises authority and one who does not—for instance, between an engineer and a fireman—yet, under the law, if both, while running a train, were injured through the negligence of the engineer of another train, the fireman, having no one under him, would have a right to recover, while the engineer, being in control of the fireman, would not. The court thought this placed the power of classification in the hands of the company, and suggested that it could substantially relieve itself from all liability by placing on each train a boy who, by its rules, would be in the charge or control of every other employee on the train. As to the suggestion, obviously the company could do nothing of the kind. By no trick of that sort could it evade the law and escape liability. The court would look through the sham to the real grades of the service. *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 380, 13 Sup. Ct. 914, 37 L. Ed. 772. But passing this, the court in its supposed case lost sight of the positions, relative to one another, occupied in the service by an

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engineer and a fireman. Under the old law the engineer was deemed the superior, and not the fellow servant, of the fireman if both were on the same engine. Now, this was a reasonable distinction, because the Supreme Court of Ohio itself made it. Is it any less reasonable to say that an engineer is the superior of a fireman, although they are on different engines? This is what the new law says. If the distinction made by the old law is reasonable, why call that made by the new arbitrary?

In each case there was an attempt to define who should be regarded as fellow servants by a process of exclusion. The old law excluded the direct superior of the injured employee; the new excludes in addition the indirect superior. The ground is the same, that they are not in a common service.

Take a practical illustration. A fireman or brakeman may fairly be said to assume the risk of injury through the negligence of another fireman or brakeman. Being acquainted with the work, he can estimate the danger, and not unreasonably may be expected to keep an eye on those engaged in the same work, thus guarding both himself and the company against negligent fellow servants. Is it unreasonable or arbitrary to say that these things are not true of the relation of a fireman or brakeman to an engineer or conductor—to say that the characteristics of a common service are not present, and that those who only carry out the orders of others ought not to be held to have assumed the risk of the negligence of those in authority over them, whose commands they must obey?

On the other hand, why should not the railroad company be held responsible for an injury to a brakeman or fireman, resulting from the negligence of a conductor or engineer, whether in his own branch or department having control over him, or in another branch or department, exercising authority there? May not such a superior be reasonably treated as the representative of the company, in a sense a vice principal, for whose negligence the company is rightly responsible, unless the person injured be a fellow servant of the negligent employee? Finally, looking at the policy of the act, is not the effect of the new rule to make railroad companies especially careful in selecting their superior employees, those who exercise authority, who give commands, and upon whose skill and judgment the safe operation of these highways of commerce largely depends?

The act of April 2, 1890, has been before the Supreme Court of Ohio at least three times (*Railroad Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11; *Railroad Co. v. Erick*, 51 Ohio St. 146, 37 N. E. 128; *Railway Co. v. Shanower*, 70 Ohio St. 166, 71 N. E. 279); and before this court twice (*Railroad Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233, 243; *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280). In all these cases, except that of *Peirce v. Van Dusen*, the constitutionality of the act was assumed and its construction alone considered. In that case the court passed upon the constitutionality of the act, but only the first clause of section 3 was involved. As to that, Mr. Justice Harlan, who delivered

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the opinion of the court, said (page 291, 24 C. C. A., page 704, 78 Fed.):

“We think it clear that the Ohio statute is not obnoxious to the constitutional provision requiring all laws of a general nature to have a uniform operation throughout the state. As it applies to all railroad corporations operating railroads within the state, it is, within the meaning of the state Constitution, general in its nature; and, as it applies to all of a given class of railroad employees, it operates uniformly throughout the state.”

By the inferior courts of the state the act has been held unconstitutional by the court of common pleas of Ashtabula county, in *Maltby v. Railroad Co.*, 13 Ohio Dec. 280, and by the court of common pleas of Lucas county, in *Froelich v. Railroad Co.*, 13 Ohio Dec. 107; and constitutional by the court of common pleas of Huron county, in *Roe v. Railroad Co.*, 13 Ohio Dec. 260 (affirmed by the circuit court of the Sixth District, 25 Ohio Cir. Ct. R. 628); by the circuit court of the same circuit (overruling the common pleas of Lucas county), in *Froelich v. Railway Co.*, 24 Ohio Cir. Ct. R. 359; and by the circuit court of the Fifth Circuit, in *Railway Co. v. Hottman*, 25 Ohio Cir. Ct. R. 140. It will be observed that the decided weight of authority is on the side of the constitutionality of the law.

Believing that the Legislature had valid and substantial reasons for extending the Ohio “law of superiors,” and that the decided weight of authority in the state is in favor of the constitutionality of the law, we hold that the provisions of section 3 involved in this case do not violate the Constitution of Ohio. Whether the law is open to just criticism as a piece of legislation is of course a matter upon which we can express no opinion. As was said by Judge Burket in *Probasco v. Raine*, Auditor, 50 Ohio St. 378, 390, 34 N. E. 536:

“The validity of an act passed by the Legislature must be tested alone by the Constitution; the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy.”

The statute being a valid one, it should have been treated by the court below as applicable in the case presented. *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 230, 284.

The judgment of the lower court is reversed, and the case remanded for proceedings not inconsistent with this opinion.

NORTHERN PAC. RY. CO. *v.* DIXON.

(Circuit Court of Appeals, Eighth Circuit, August 4, 1905.)

[139 Fed. Rep. 737.]

Master and Servant—Telegraph Operator Fellow Servant of Members of Train Crew.*—A local telegraph operator, whose duty it is to gather and give information to the train dispatcher relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, is a fellow servant of the train operatives in giving such information, so that the master is not liable to them for injuries caused by an erroneous order of the dispatcher, induced by false information given by the local operator.

Same—Negligence—Res Ipsa Loquitur Inapplicable.†—The doctrine, "Res ipsa loquitur," is inapplicable to negligence cases arising between master and servant, because the possible causes of accidents during service are many, for some of which the master, and for others of which the servant, is responsible, and the happening of an accident does not indicate to which class its cause belongs. The burden in such cases is always on him who alleges that the master was guilty of causal negligence to establish that fact. A finding that an accident happened and that the servant injured was not at fault does not sustain this burden, because the accident may have been unavoidable, or may have resulted from the negligence of fellow servants or from other causes for which the master is not liable.

Same—Meeting Orders—Rules of Company Construed.—The rules of a railroad company, that meeting orders must not be sent for delivery to trains of superior right at the points of execution if this can be avoided, and that there should be, if possible, at least one telegraph office between those at which opposing trains meet, do not constitute a peremptory prohibition and command, but except cases in which an ordinarily prudent man would deem it reasonably safe, in the light of the knowledge which the dispatcher has, to send a meeting order for delivery to a train of superior right at the point of execution, or to send meeting orders to opposing trains at points between which there is no telegraph station, and there is no other practical way to reasonably operate the railroad.

Same—Train Dispatcher May Rely on Local Operator's Statement That Train Is Late.—The movement of freight trains by telegraphic orders, based on information relative to the location of the trains upon a railroad gathered and telegraphed by local operators or station agents to the train dispatcher, is a rational, careful, and approved method of operating a railroad. It is not a lack of ordinary care for a train dispatcher to believe, rely, and act upon such information, although it shows that an extra freight train has not reached a given station several hours after it was due to pass it.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

The defendant in error, as administratrix of the estate of

*For the authorities in this series on the question whether a train dispatcher and telegraph operator are fellow servants of other railroad employees, see foot-note appended to *McHugh v. Manhattan Ry. Co.* (N. Y.), 14 R. R. R. 284, 37 Am. & Eng. R. Cas., N. S., 284; foot-note appended to *Santa Fe Pac. R. Co. v. Holmes* (C. C. A.), 16 R. R. R. 248, 39 Am. & Eng. R. Cas., N. S., 248.

†See foot-notes appended to *Chicago & N. W. Ry. Co. v. O'Brien* (C. C. A.), 14 R. R. R. 227, 37 Am. & Eng. R. Cas., N. S., 227.

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Chauncey A. Dixon, brought this action against the Northern Pacific Railway Company, as she was authorized to do by the statutes of the state of Montana, to recover damages for the death of her son, Chauncey, which she alleged was caused by the negligence of the plaintiff in error. The parties waived a jury and made an agreed statement of facts, upon which the court rendered the judgment against the company which is here challenged. The facts material to the determination of the questions now presented are these: Dixon was a fireman employed by the company in operating extra freight train No. 162, and he was killed on December 25, 1899, by means of a head-end collision of that train with extra freight train No. 159. The railway company was operating its railroad in Montana. It had made and promulgated time-tables for its regular trains, and had adopted reasonable rules for the operation of all its trains. The time-tables did not and could not provide for the running of extra trains. The railway company had in its employment a train dispatcher at Missoula, in the state of Montana, who had general power and sole authority to make and promulgate orders for the running of those trains which were not governed by the time-tables on the division of its railroad on which this collision occurred. A large proportion of its trains on this division were run as extra trains, and the times of their arrival and departure were not shown on the regular time-tables, but their movements were made upon telegraphic orders issued by the train dispatcher upon information furnished by telegraph to the train dispatcher by its station agents and operators along the line of the railroad. All these facts were well known to the intestate, Chauncey A. Dixon. The main line of the railroad extends from Missoula east to Helena, through Bonita, 26 miles east of Missoula, Carlan, 33 miles east of Missoula, Drummond, 53 miles east of Missoula, and Garrison, 74 miles east of Missoula. It has but a single track. This railroad has a branch, which extends in a southeasterly direction from Garrison to Butte. On the night of December 24, 1899, No. 162 was running east on the main line from Missoula to Helena, and No. 159 was running northwest on the branch line from Butte to Garrison. These trains were running under special schedules not included in the time-tables, and under the telegraphic orders of the train dispatcher at Missoula, in accordance with the rules of the company. No. 162 left Missoula for Helena at 10:20 p. m. on December 24, 1899. It arrived at Bonita at 12:35 a. m. on December 25, 1899, and left there at 12:50 a. m. on that day. It was the duty of the telegraph operator and station agent at Bonita to observe the movement of trains passing through this station, and to advise the train dispatcher at Missoula of their movements. But he was asleep when this train passed his station, and he did not know of or report its passage. The only telegraph offices open during the night between Missoula and Garrison were those at Bonita and Drummond. When No. 162 left Missoula, and when it left Bonita, No. 159 was still on the branch line between Butte

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and Garrison, where it arrived at 1:05 a. m., and “until said train No. 159 reached Garrison it had not been nor could it be determined whether said train No. 159 would run beyond Garrison or would stop at that point.” The rules of the company provide, among other things, that “meeting order or orders, conferring rights to the point where placed, must not be sent for delivery to the trains of superior right at the point of execution, if it can be avoided. When it cannot be avoided, special precaution must be taken by the train dispatcher and operators to insure safety, and the following notice will be incorporated in the order, viz.: Train ——— gets this order at ———. There should be, if possible, at least one telegraph office between those at which opposing trains receive meeting orders.” Upon the arrival of No. 159 at Garrison, at 1:05 a. m. on December 25, 1899, the train dispatcher asked the telegraph operator and station agent at Bonita by telegram whether or not train No. 162 had arrived there, and he promptly answered that it had not. The train dispatcher then ordered the train crew of No. 159 to run extra from Garrison to Missoula, and to meet No. 162 at Carlan, and this order was received by that crew at Garrison. At the same time he ordered the crew of No. 162 to meet No. 159 at Carlan, and sent this order to the operator and station agent at Bonita to deliver to them. He ordered a red signal displayed at Drummond to stop No. 159, so that the meeting point could be changed on its arrival at that station if necessary. These orders were complete at 1:18 a. m. At 1:20 a. m. No. 159 left Garrison, and it arrived at Drummond at 1:57 a. m., and the train dispatcher was immediately informed of this fact. He then inquired of the operator and station agent at Bonita whether or not extra freight No. 162 had arrived at Bonita yet, and the latter promptly replied, “No sign of them yet.” He then asked him if he was sure No. 162 had not passed, and he replied, “Yes.” The train dispatcher then repeated his inquiry, and the operator and station agent at Bonita answered, “Yes, I am sure freight 162 has not passed.” Thereupon the train dispatcher issued an order to the crew of No. 159 to meet No. 162 at Bonita, and an order to the crew of No. 162 to meet No. 159 at Bonita, and sent the former order to Drummond and the latter to Bonita. The crew of No. 159 received their order and proceeded with their train. It collided with No. 162, and the intestate, Dixon, was killed by the collision, about four miles west of Drummond, at 2:15 a. m.

James B. Kerr (*Emerson Hadley* and *C. W. Bunn*, on the brief), for plaintiff in error.

A. M. Antrobus (*D. J. O'Connell* and *R. J. Burglehaus*, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the first hearing of this case the negligence of the local

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operator at Bonita, who slept at his post and falsely informed the train dispatcher that extra freight No. 162 had not passed his station, was conceded to have been the cause of the collision and of the death of the intestate, and the only question argued was whether or not this operator was a fellow servant of the deceased, who was a fireman on that train. The Supreme Court decided that he was (*Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006), and thus disposed of the only issue that was then presented in this court. Since that decision was rendered counsel for the defendant in error has prepared another brief and argument, in which he contends that, although the negligence of the local operator may have been one of the causes of the accident, the negligence of the train dispatcher was either the proximate cause of or contributed to cause it. This contention presents two questions: (1) Was the train dispatcher guilty of negligence which either caused or contributed to cause the injury? and (2) was the train dispatcher the fellow servant of the fireman, or the vice principal of the railway company? The contention that the lack of care of the train dispatcher contributed to cause the injury is (1) that the accident itself and the finding of the court below that the fireman was not guilty of contributory negligence raise the legal presumption that the accident was caused by the negligence of the railway company; (2) that the failure of the train dispatcher to notify the crew of extra freight No. 162 that they would meet extra freight No. 159 was causal negligence; and (3) that the sending of the final order to the crew of No. 162 at Bonita to meet No. 159 at that place was a violation of the rules of the railway company and a negligent act of the train dispatcher which contributed to the injury.

But the doctrine, "*res ipsa loquitur*," is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, the risk of some of which, such as the negligence of fellow servants and the other ordinary dangers of the work, the servant assumes, while for the risk of others, such as the lack of ordinary care to construct or keep in repair the machinery or place of work, the master is responsible. The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk of which is the servant's, or from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that the negligence of the master caused the accident to establish that fact, and a naked finding, as in this case, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow servants and latent and undiscoverable defects in place or machinery, which may have pro-

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duced it. *Chicago & N. W. Ry. Co. v. O'Brien*, 132 Fed. 593, 596, 598, 67 C. C. A. 421; *Westland v. Gold Coin Mines Co.*, 41 C. C. A. 199, 200, 101 Fed. 65; *Texas & Pac. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *O'Connor v. Ry. Co.*, 83 Iowa, 105, 48 N. W. 1002; *Brownfield v. Ry. Co.*, 107 Iowa, 254, 77 N. W. 1038; *Brymer v. Ry. Co.*, 90 Cal. 497, 27 Pac. 371; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; *Wormell v. Railroad Co.*, 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321; *Grant v. Railroad Co.*, 133 N. Y. 659, 31 N. E. 220. The happening of the accident and the absence of contributory negligence of the servant constitute no substantial evidence of the causal negligence of the master, and are insufficient to support a finding or judgment against him for the injury which resulted from it.

In *Northern Pac. Ry. Co. v. Mix*, 121 Fed. 476, 57 C. C. A. 592, the Circuit Court of Appeals of the Ninth Circuit sustained a judgment against the plaintiff in error in this case for injuries to the head brakeman of extra freight No. 162, caused by the collision under consideration here, upon the ground that the train dispatcher was guilty of negligence because he did not notify or endeavor to notify the crew of that train at or before it passed Bonita that they were to meet freight train No. 159 on their way to Helena, and that case is cited and urged upon our consideration to secure a like conclusion in this case. In the case in hand, however, the parties have agreed that prior to 1:05 a. m. of December 25, 1899, No. 159 was not running upon the main line between Missoula and Helena, which No. 162 was to traverse, but was upon a branch railroad between Butte and Garrison; that No. 162 left Bonita going east at 12:50 a. m., 15 minutes before No. 159 arrived at Garrison; that "until said train No. 159 reached Garrison it had not been nor could it be determined whether said train No. 159 would run beyond Garrison or would stop at that point," a fact which does not appear in the report of, and which doubtless was not proved in, the *Mix* Case; and that there was no telegraph station open on the night of the accident between Bonita and the place of the collision. The absence from the *Mix* Case of the controlling fact which appears in this case, that the train dispatcher did not know and could not learn whether or not No. 159 would ever come upon the main line of railroad over which No. 162 was to run until after the latter train had left Bonita, distinguishes that case from the one we have in hand and renders farther consideration of it useless. Inasmuch as, prior to the departure of No. 162 from Bonita on its way east, No. 159 was not upon the line of railroad which No. 162 was to traverse, and it was not known and could not be determined before 1:05 a. m., when it arrived at Garrison, whether or not it would ever go upon that line of railroad, the train dispatcher was guilty of no negligence in that he failed to notify, or try to notify, the crew of No. 162, before they left Bonita, that they would meet No. 159, a fact which he did not

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know and could not know until 15 minutes after they had left that station.

Counsel for the defendant in error insists that the train dispatcher failed to exercise ordinary care, because he sent his last meeting order for delivery to No. 162, a train of superior right, at Bonita, the point of execution, in violation of the rules that such orders must not be sent for delivery to the points of execution if that course can be avoided, and that there should be, if possible, at least one telegraph office between those at which opposing trains receive meeting orders. There are two reasons why this position seems to be untenable. In the first place, these rules do not imperatively require a telegraph office between those at which opposing trains receive meeting orders, nor peremptorily forbid the delivery of a meeting order to a train of superior right at the point of execution. The requirement is conditioned by the words "if possible," and the prohibition by the phrase "if it can be avoided," and the true interpretation of these rules is that the command and inhibition are to be obeyed, if this may be done consistently with a rational and practical operation of the railroad. They do not mean that the train dispatcher must stop the operation of the railroad, or that trains must be sent back toward their starting points, until meeting orders can be delivered to trains of superior right at points other than those of their execution and a telegraph office can be interposed between the stations at which opposing trains receive their meeting orders, when an ordinarily careful and prudent man would deem it reasonably safe, in the light of the knowledge which the dispatcher has, to send a meeting order for delivery to a train of superior right at the point of execution, or to deliver such order to opposing trains when there is no telegraph office between them, and there is no other practical and rational manner of keeping the railroad in operation. In the case at bar the first meeting order issued was not sent for delivery to the train of superior right at the point of execution, and there was a telegraph office between those at which the opposing trains were to receive their first orders. In those orders the meeting place was Carlan. The order was sent for delivery to No. 162 at Bonita and to No. 159 at Garrison, and the telegraph office at Drummond was between them. The order was not delivered to the crew of No. 162, because the false statement of the operator that it had not passed Bonita misled the dispatcher. No. 159, however, received its order and advanced to Drummond. There was then no telegraph office between Drummond and Bonita, and it was not possible to interpose one between the places where the opposing trains must receive subsequent orders, or to send a meeting order for delivery to No. 162 at a place other than the point of execution, without sending one or both of the trains back, or holding No. 159 at Drummond until 162, which appeared to the dispatcher to have been delayed west of Bonita, should reach Drummond. The adoption of such a course would not have been the adoption of ordinary, but of extraordinary, care,

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and this the law did not require. When No. 159 arrived at Drummond, the dispatcher asked the operator at Bonita a second time if No. 162 had arrived there, and he replied, "No sign of them yet." He asked if he was sure that No. 162 had not passed, and he answered, "Yes." He repeated the inquiry, and the operator replied, "Yes, I am sure freight 162 has not passed." Then it was that the dispatcher ordered the trains to meet at Bonita, and sent the order for the crew of No. 162 to that place for delivery, and the order for the crew of No. 159 to Drummond. The railway company did not become liable for injuries caused by the collision, and the train dispatcher displayed no lack of ordinary care and violated no rule of the company by this action, because it was not then possible, within the true meaning of the rules, to have a telegraph office between those at which these trains were to receive their meeting orders, and the sending of the meeting order to the train of superior right at the point of execution could not be avoided.

In the second place, if the last meeting orders were in violation of the rules of the company, they did not contribute to cause the accident, and consequently they were not actionable. The collision would, in all probability, have happened if no change had been made in the place of meeting. In that event No. 159 would have proceeded from Drummond toward Carlan, the appointed place for the trains to meet, and before it had arrived at that place it would inevitably have met and collided with No. 162, exactly as it did under the orders which changed the place of meeting. The judgment against the company cannot be sustained on account of the last meeting orders, because the dispatcher violated no rule of the company and was guilty of no negligence in issuing them, and because they contributed in no way to cause the collision.

When the final orders were made, 3 hours and 37 minutes had elapsed after No. 162 had left Missoula, and a reasonable time for it to reach Bonita was not more than 1 hour and 30 minutes. Counsel argues that the dispatcher was negligent, because he did not assume that the repeated statement of the operator at Bonita that this train had not passed that station was false, and because he did not operate the railroad on that theory, or stop its operation until he could send a messenger over the road, or could in some other way ascertain what the fact was. But this contention is unworthy of serious consideration. The delay of a freight train a few hours beyond its regular time is not so extraordinary an occurrence that a man of ordinary caution would be led to believe or to suspect the falsity of the statement of a local operator on the railroad, whose duty it is to know the fact and to communicate it, that it had not reached or passed his station. Many adequate possible causes of such delays at once suggest themselves to the mind, such as pulled drawbars, hot boxes, broken rails, other possible defects of the road and machinery, and the negligence and mistakes of the trainmen. If the statement of the operator had been true, and the dispatcher had sent

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another train from Missoula to Bonita on the theory that it was false, and it had crashed into No. 162 and injured its crew, his negligence would have been patent. The truth is that the movement of extra freight trains by telegraphic orders, based upon the information of the location of the trains upon the railroad gathered and communicated by local telegraph operators is a rational, careful, and approved method of the operation of railroads. This railroad had been and was operated in this way, and the fireman, Dixon, knew it. The risk of this method of the movement of trains was one of the ordinary hazards of his service, which he assumed when he accepted his employment, and as long as the train dispatcher directed the movement of the trains by that method with ordinary care he could not be successfully charged with actionable negligence, while if he had disregarded the information furnished by the local operators, and had operated the railroad upon his own surmise or estimate of the respective locations of the trains upon it, his lack of ordinary care would have been clear and undeniable. The fact is that it is clear, beyond all reasonable doubt that the proximate cause of this accident was the negligence of the local operator, who slept at his post and falsely informed the dispatcher that No. 162 had not passed his station. That untrue statement was the sole cause of the meeting orders issued by the dispatcher, and of the accident which resulted from them. In the light of that statement, upon which it was his right and his duty to rely and to act, the acts of the train dispatcher were rational, prudent, and free from any lack of ordinary care, and no judgment against the company can be sustained on account of them.

The conclusion that the train dispatcher was guilty of no negligence renders it unnecessary to consider or to determine the question whether or not he was a fellow servant of the fireman, and that issue is reserved for consideration at some future time, when its determination shall become necessary to the decision of some living issue. The judgment of the Circuit Court must be reversed, and the case must be remanded, with instructions to render a judgment upon the agreed statement of facts in favor of the defendant in the court below; and it is so ordered.

 LOUISVILLE & N. R. Co. v. MORTON.

(Court of Appeals of Kentucky, Nov. 9, 1905.)

[89 S. W. Rep. 243.]

Negligence—Evidence—Precautions against Recurring Injury.*—
 Evidence of the repair or supply of a defect after the occurrence of

*For the authorities in this series on the question of the admissibility of evidence of subsequent repairs or other subsequent precautions, in negligence cases, see foot-notes appended to *Titus v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 129, 39 Am. & Eng. R. Cas., N. S., 129.

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an injury caused by such defect is not competent on the issue of whether the appliance was reasonably safe before the repair was made, nor for any other purpose.

Evidence—Expert Testimony—Experience of Witness.—In an action for injuries to a servant engaged in loading logs onto a car, persons having experience and skill in the business of loading logs may testify as to the usual and proper way of loading such logs and what are the dangers attending the work; but persons who have not had such experience should not be allowed to give their opinions on the subject.

Appeal from Circuit Court, Hopkins County.

“To be officially reported.”

Action by Charles Morton against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Benjamin D. Warfield and Clifton J. Waddell, for appellant.

Gordon, Gordon & Cox, for appellee.

HOBSON, C. J. Charles Morton was a section hand in the employment of the Louisville & Nashville Railroad Company. A freight train dropped some logs, and the section foreman took his crew to pick them up. He loaded the logs upon some trucks and took them to the nearest station, and there he undertook to load them on a freight car by means of skids reaching from the ground up to the car. It was a cold day. There was ice on the logs and ice on the skids. When they began rolling the logs some one of the hands said that they ought to have a rope to hold them. The boss said: “Roll the log up.” It was a large white oak log, weighing 3,000 or 4,000 pounds. One man stood at each end to chock the log. One of the men had an ax and the other a brick. When the log got nearly to the top, the brick slipped on the ice. The log came back. The men at that end of the log ran out of the way, but Morton, who was working at the other end, had not time to get out of the way of the log, and was caught and injured. He filed this suit to recover for his injury, and a verdict and judgment having been rendered in his favor for the sum of \$500, the railroad company appeals.

The court allowed the plaintiff on the trial to prove by himself and a number of other witnesses that after he was hurt the foreman went and got a rope, and by tying one end of it to the car and passing it around the log two men at the rope could hold the log without any trouble, and so the logs were in this way subsequently loaded without danger or difficulty. The court, in admitting the evidence, told the jury that it was to be considered by them only in determining whether the manner of loading the logs first employed was a reasonably safe means, and that it could not be considered in any way as bearing upon the question as to whether the defendant knew that the first means employed was not reasonably safe. The defendant excepted both to the evidence and to the admonition of the court. The court in so ruling followed Labatt on Master and Servant, §§ 133, 824. We cannot concur in this view of the law. In Standard Oil Com-

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pany v. Tierney, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595, it was held that subsequent precautions or subsequent repairs after an injury has occurred are not competent evidence against the defendant, on the ground that such evidence raises distinct and irrelevant issues for the consideration of the jury, and puts an unfair interpretation upon human conduct, virtually holding out an inducement for continued neglect. This case was followed in L. & N. R. R. Co. v. Bowen, 39 S. W. 31, 18 Ky. Law Rep. 1099. In Republic Iron & Steel Works v. Gregg, 71 S. W. 900, 24 Ky. Law Rep. 1627, the defendant offered to show that the machinery was operated after the accident without injury in the same condition as at the time of the accident. The plaintiff offered to show that subsequent to the injury the machinery was repaired. The court held that the evidence of neither side was competent. These cases are in accord with the great weight of authority. The case of Champion Ice Manufacturing Company v. Carter, 51 S. W. 16, 21 Ky. Law Rep. 211, does not lay down a different rule. That case turned simply upon the evidence that had been introduced.

A person cannot make evidence for himself, and therefore the defendant cannot, by allowing a defect to continue, make this evidence in his behalf. The issue the jury are to determine is whether ordinary care was used before the injury to the plaintiff. What care was used after the injury is immaterial. Many persons, after an accident has occurred, will use extraordinary precautions to prevent a recurrence of it. On another trial either the plaintiff or the defendant may be allowed to prove by persons having experience and skill in the business of loading logs, what is the usual and proper way of loading such logs and what are the dangers attending the work; but witnesses who have not had such experience in the business as to be considered experts should not be allowed to give their opinions on the subject. We see no other error in the record. The instructions of the court properly presented the law of the case.

Judgment reversed, and cause remanded for a new trial.

ILLINOIS CENT. R. CO. v. COLLY.

(Court of Appeals of Kentucky, April 19, 1905.)

[86 S. W. Rep. 536.]

Injury to Passenger—Sudden Jar—Sufficiency of Evidence.—Where, in an action for injuries to a passenger, she testified that as she was about to take her seat in the car she was thrown to the floor and injured by the force with which another car was backed against the car in which she was located, such evidence, though uncorroborated, required the denial of a peremptory instruction for defendant.

Same—Same—Negligence—Instructions.—In an action for injuries to a passenger by the violent striking of the coach by another car before plaintiff was seated, error in an instruction in failing to require a finding of negligence in the unnecessary and violent striking of the

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coach as alleged was cured by another instruction charging that, if plaintiff was entitled to recover at all, it was on the ground that defendant's servants were negligent in coupling the cars with such unusual and unnecessary force as to cause her to sustain the injuries complained of, etc.

Same—Same—Negligence in Coupling—Custom—Instruction.—An instruction authorizing a finding for defendant if the coupling was made in a way that was customary and incidental to railroading, without defining the degree of care with which it should have been done, was unduly favorable to defendant.

Instructions.—Requested instructions, in effect embraced in those given, may be properly refused.

Compromise—Evidence.*—In an action for injuries to a passenger, evidence that during negotiations for a settlement plaintiff fixed the amount of her damages at \$500, instead of \$2,000, the amount sued for, was inadmissible.

Argument of Counsel.—Where, in an action for injuries to a passenger caused by alleged negligence in the operation of the train, defendant's counsel in argument stated that railroads employ careful and competent engineers, that it was to their interest to do so, etc., a statement made by plaintiff's counsel in answer thereto that statistics furnished by the interstate commerce commission showed that during the preceding year 60,000 persons were killed and crippled on railroads of the United States was not reversible error.

Sufficiency of Evidence.—In an action for injuries to a passenger, her uncorroborated evidence held sufficient to sustain a verdict in her favor.

Personal Injuries—Excessive Verdict.—Where, in an action for injuries to a passenger, she and her physician testified that she was hurt in the back and hip; that her suffering was great, and continued down to the trial, though the physician was not sure that her health was permanently injured—a verdict in her favor for \$750 was not excessive.

Appeal from Circuit Court, Fulton County.

"Not to be officially reported."

Action by Joe Ann Colly against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Robbins, Thomas & Carr, J. M. Dickinson, and Trabue, Doolan & Cox, for appellant.

Lee & Hester, for appellee.

SETTLE, J. The appellee recovered judgment in the lower court against the appellant for \$750 damages for injuries sustained to her person by the alleged negligence of its employees while she was a passenger upon one of its trains. According to the averments of the petition and the evidence introduced by appellee in support thereof her injuries were received as follows: Appellee and her husband purchased tickets at Fulton, and there took passage on appellant's train at night for the purpose of going to Mayfield to visit their daughter. Upon entering the coach and finding all the seats near them occupied, they went

*For the authorities in this series on the question of the admissibility of evidence of offers to compromise, see foot-note appended to *Georgia Ry. & Electric Co. v. Wallace & Co. (Ga.)*, 16 R. R. R. 793, 39 Am. & Eng. R. Cas., N. S., 793.

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toward the other end in search of a seat, and walked the length of the coach without finding one. Thereupon appellee's husband left her standing in the aisle, and retraced his steps still looking for and hoping to find a vacant seat for her. After her husband left her, appellee was offered a seat by a woman near by, who removed a child to her lap to make room for her. As appellee was about to take the seat thus offered her, the car in which she was standing, by the alleged negligence of appellant's servants in charge of the train, was suddenly and with unusual and unnecessary force and violence struck by another coach attached to the engine, which was backed against and coupled to it, and she was thereby caused to fall against the seat or some part of the car and to the floor, whereby she was jarred and stunned to such an extent as to render her unconscious for a time, and her hip and back so injured as to then and continuously thereafter cause her great physical and mental pain and suffering. The answer denied the negligence complained of, or that the cars were brought together, in making the coupling, with more than the usual or necessary force, or that appellee was thereby thrown down or injured, and averred contributory negligence on her part, but for which her injuries, if any, would not have been received. The plea of contributory negligence was denied by the reply, which completed the issues. We will notice only such of the grounds for a new trial as are now relied on by appellant for a reversal.

It is insisted for appellant that the trial court erred in refusing the peremptory instruction asked by it at the conclusion of appellee's testimony. The peremptory instruction would not have been proper. Though appellee alone testified in support of her cause of action, her statements, if accepted by the jury, sustained the averments of the petition as to the manner of receiving her injuries, and established the fact that they were caused by the negligence of appellant's servants in making the coupling complained of. A peremptory instruction should never be given in behalf of the defendant when there is any evidence, however slight, tending to support the plaintiff's cause of action.

It is further insisted for appellant that the court did not properly instruct the jury, and that it erred in refusing to give certain instructions asked by appellant. Instruction No. 1 given by the court was improper, as it authorized the jury to find for appellee if the coach in which she was a passenger was so negligently or recklessly moved by appellant's servants as to cause her injuries, whereas the cause of action was not only the negligent moving of the cars, but also the negligent, unnecessary, and violent striking of the coach she was in by or against another in effecting a coupling, and this feature of alleged negligence should also have been presented by the instruction. The error in this instruction was, however, cured by instruction No. 2, which directed the attention of the jury to the fact that, if appellee was entitled to recover at all, it was upon the ground that appellant's servants were guilty of negligence in coupling

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the cars with such unusual and unnecessary force as to cause her to fall and sustain the injuries complained of; and the same instruction, in substance, further told the jury that if they believed from the evidence that appellant's servants handled the coach in which appellee was a passenger in the usual manner, and made the coupling in the ordinary way incidental to railroading, or if appellee was herself guilty of negligence, but for which she would not have been injured, they should find for appellant. Instruction 2 was unduly favorable to appellant, in that the jury were authorized by it to find for appellant if the coupling of the cars was made in the way that was customary and incidental to railroading, without defining the degree of care with which it should have been done. The manner in which such coupling is usually done by appellant's servants or other railroad men may not be a reasonably safe or careful way of doing such work.

Instruction No. 3 was devoted to definitions of negligence and ordinary care. Considered as a whole, the instructions were as favorable to appellant as was proper, but in some respects prejudicial to appellee. As the refused instructions asked by appellant were, in effect, embraced by those given, appellant has no cause of complaint on that score.

Appellant also complains that the court erred in excluding as testimony the fact it offered to prove by appellee that in an effort to settle with appellant before suit her claim against it for the injuries alleged to have been sustained by the negligence of its servants, she fixed the amount thereof at \$500, or offered to settle at that sum, instead of \$2,000, the amount for which she sued. We think this testimony was properly excluded by the court. The offer of appellee to accept \$500 in settlement of her claim was made before suit was filed, was made doubtless to avoid a suit, and was an offer to compromise, proof of which is never admissible as evidence.

Another alleged error complained of is that counsel for appellee was allowed by the court to make certain improper statements in argument to the jury, to the effect that the "statistics furnished by the interstate commerce commission show that during last year 60,000 persons were killed and crippled upon the railroads of the United States, and that the facts of the case at bar proved that the servants of appellant were reckless or careless in the management of the train upon which appellee was injured." The statements in question were made, as shown by the record, in reply to a statement of appellant's counsel in argument to the jury that the railroads employ careful and competent engineers, that it was to their interest to do so to preserve its property and protect its passengers, and if they were not competent and careful men they would not be retained, and the fact that Engineer Crogan (who was a witness for appellant) had been an engineer for 24 years showed he was a competent and careful engineer, and could be trusted in handling trains. In view of what was said by appellant's counsel, we are not

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prepared to say that the statements of appellee's counsel complained of were improper. While not appearing in the record, the facts and figures furnished by the report of the interstate commerce commission became and are a part of the history of the country, and as such are known to the reading public. Ordinarily, things well known, especially matters of history, need not be proved, and it would be a harsh rule, indeed, that would forbid one charged with the duty of instructing others from drawing upon the facts of history to illustrate a thought or point an argument. At any rate, it is not apparent from the record that appellant was prejudiced by the remarks of counsel complained of.

Finally, it is complained by appellant that the verdict of the jury is not supported by, and is contrary to, the evidence, and, further, that it is excessive. We cannot sustain either of these contentions. It is true that appellee stands alone in her testimony as to the manner in which her injuries were received. She seems to have known none of her fellow passengers on the train, and none of them was introduced by her or appellant as witnesses. Appellee described with particularity the facts and circumstances connected with and leading to the accident. As to the fact that she was thrown down by the striking of the car she was on, and as to the character and extent of her injuries, she was uncontradicted. Appellant introduced its trainmen, who testified that the coupling of the cars on the occasion in question was done in the usual way, and without force or violence. The jury were the triers of the facts, and they had the right to accept the testimony of appellee as to the truth of the matter and reject that of appellant's witnesses. "We cannot say that mere numerical superiority of witnesses on one side constitutes preponderance of proof, nor can we disturb the verdict as not being sustained by sufficient evidence." *Alcorn v. Powell, etc.*, 60 S. W. 520, 22 Ky. Law Rep. 1354. As to the injuries of appellee, her own testimony, as well as that of her physician, showed that she was hurt in the back and hip, that her suffering was great, and that it continued down to the time of the trial of the cause. The physician was not sure that her health was permanently injured; probably that fact cannot yet be determined. Upon the whole case, while the compensation allowed appellee by the jury was liberal, from the proof we are unable to say that it was excessive.

Wherefore the judgment is affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* ADAMS.

(Supreme Court of Arkansas, March 18, 1905.)

[86 S. W. Rep. 287.]

Appeal—Remittitur.*—Though, in a personal injury case, in which plaintiff is clearly entitled to recover, evidence of the size of plaintiff's family, calculated to arouse the sympathy of the jury, is erroneously admitted, the court will allow an affirmance on remittitur of a sum which will clearly cure any possible prejudice.

Hill, C. J., dissenting.

On motion to allow remittitur. Granted.

For former opinion, see 85 S. W. 768.

Dodge & Johnson, for appellant.

Oliphint & Hardcastle, for appellee.

RIDDICK, J. On motion of plaintiff to be allowed to enter a remittitur. We have heretofore decided that the judgment of the circuit court in this case should be reversed, and a new trial ordered, on account of error in the admission of evidence which, to quote from the opinion delivered, was "calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted." The court was of the opinion that the evidence was sufficient to warrant a verdict against the defendant, and that the error committed did not affect the finding of the jury on the question of whether the defendant was liable for the injury suffered by plaintiff, but that it probably enhanced the damages found by the jury. The counsel for plaintiff now asks leave to be allowed to enter a remittitur for such sum as will relieve the judgment of any excess in the way of damages, will remove the effects of the error in the admission of improper testimony.

The first question presented is whether a judgment for any amount can be permitted to stand in a case of this kind, where there has been improper evidence admitted. "The tendency of the late decisions," says Mr. Sutherland in his work on Damages, "is in the direction of unqualified support for the practice which allows the appellate and trial court, in cases in which excessive damages have been awarded, and in which the plaintiff is entitled to substantial damages, to indicate the excess, and give him the option to remit and take judgment for the residue, or to be awarded a new trial." Sutherland on Damages (3d Ed.) § 460. A question similar to this was considered by this court in a recent case, where it was said that the "theory upon which a remittitur is allowed is that the appellant has no just complaint, save that the damages are excessive, and that, inasmuch as the

*For the authorities in this series on the subject of the effect of, or admissibility of evidence of, the financial circumstances or size of family, etc., of parties, in negligence cases, see foot-note appended to *St. Louis, etc., Ry. Co. v. Adams* (Ark.), 16 R. R. R. 843, 39 Am. & Eng. R. Cas., N. S., 843.

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appellate court can say that the given verdict is excessive, it can designate an amount that will not be, and give the successful party the option to remit the excess or submit to a new trial." But in that case the court held that the remittitur could not be allowed, because the error complained of might, in the opinion of the court, have affected the verdict on the question of whether the defendant was liable for damages or not. *Railway Co. v. Warren*, 65 Ark. 628, 48 S. W. 222. The court in that opinion was discussing a case in which the damages were held to be excessive. But a remittitur may be permitted not only to cure the excess in a verdict which is plainly excessive, but also to cure any possible effect of evidence improperly admitted, the effect of which may have been to unduly enhance the amount of damages. For, to quote the language of a late decision of the Supreme Court of Wisconsin, "There is no good reason to restrict the practice so as to exclude any case, whether on contract or sounding in tort, where the plaintiff is clearly entitled to recover, and a sum can be named which, in all reasonable probability, will not exceed the amount which a jury will ultimately give him." *Baxter v. Ch. & N. W. Ry. Co.*, 104 Wis. 307, 80 N. W. 644. Where the right to recover is clear, and has been established by the verdict of a jury, and where the errors committed in the trial go only to the enhancement of the amount of the verdict, and do not affect the question of whether defendant is liable or not, then, if the verdict be excessive, or if, on account of improper evidence, or improper argument of counsel, tending to enhance the amount of damages allowed, the court is not able to say from the evidence that the verdict is not excessive, and that the defendant was not prejudiced in respect to the amount of the damages assessed by such improper evidence or argument, the court may, in its discretion, name a sum which is clearly not excessive, and, as a matter of grace to the plaintiff, allow him to accept judgment for that amount, instead of a new trial. *Railway Co. v. Warren*, 65 Ark. 628, 48 S. W. 222; *Little Rock & Ft. S. Ry. Co. v. Barker*, 39 Ark. 491; *Baxter v. Ch. & N. R. Co.*, 104 Wis. 307, 80 N. W. 644; *McCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707; *Hocks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113; *Rueping v. Ch. & N. W. Ry. Co.*, 116 Wis. 625, 93 N. W. 843, 96 Am. St. Rep. 1013; *Telegraph Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Trow v. Village of White Bear*, 78 Minn. 432, 80 N. W. 1117; *Wimber v. I. C. Ry. Co.*, 114 Iowa, 557, 87 N. W. 505; *Ribich v. Lake S. S. Co.*, 123 Mich. 401, 82 N. W. 279, 48 L. R. A. 649, 81 Am. St. Rep. 215; *Belt v. Lawes*, 12 Q. B. Div. 356; 2 Sutherland on Damages (3d Ed.) § 460; 13 Cyc. 134. In doing this the court does not invade the province of the jury, for the court is not undertaking to state the exact amount of pecuniary loss which plaintiff has suffered, but is only naming an amount which, under the evidence, the court can see is clearly not excessive. As the matter of permitting a remittitur to be entered, and allowing the judgment to stand for the remainder, is largely a matter of discretion,

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the court will be less inclined to grant this privilege where the errors at the trial have been gross, or where improper conduct on the part of plaintiff or his counsel has been such as to excite the prejudices of the jury; and it will be more inclined to grant it in cases where there has been a fair and impartial trial, but where, on account of mere error in the finding of the jury, the damages allowed are greater than the evidence justifies.

As the error pointed out in this case was not a very culpable one, or one that involves any reflection on plaintiff or his counsel, and as, in the opinion of the majority of the judges, the only just ground for objection to the judgment rendered is that, on account of the improper evidence admitted, it may be, and probably is, larger than would otherwise have been rendered, and to that extent excessive, we are of the opinion that it is within our discretion to permit a remittitur to be entered, and to allow the judgment for the remainder to stand. But before naming the amount that we think should be remitted, we will call attention to the principles by which it seems to us that the court should be guided in ascertaining the amount to be remitted. In the case of *Railway v. Hall*, 53 Ark. 7, 13 S. W. 138, where the trial court erroneously instructed the jury that they might allow exemplary damages, the learned judge who delivered the opinion of the court, refusing to permit a remittitur, called attention to the various elements that went to make up the damages in a case of tort for personal injury, such as loss of time, pain and suffering, etc., said: "The difficulties which beset a court in determining the justness or excessiveness of a verdict based on these premises alone would not be inconsiderable. But superadd the element of punitive damages erroneously allowed, and the process by which the court is to dissect the verdict, eliminate the error, eliminate the excess of compensation, and settle upon the exact sum which plaintiff's case entitles him to have, 'passeth all understanding.'" Now, while we do not wish to make any criticism of the decision in that case, still it does not seem to us entirely correct to say, as the judge there intimates, that the court, in naming a sum which the plaintiff may elect to take, if he prefers it to a new trial, is aiming to state the exact sum which plaintiff is entitled to recover. In actions for breaches of contracts, and sometimes in other cases, it may happen that the exact amount of the excess in an excessive judgment can be ascertained from the evidence; and in those cases the court will determine the exact amount due, and will permit the judgment to stand for that amount, whatever it may be, if plaintiff will remit the excess. But in actions to recover for damages for personal injuries, where the amount of the damages is not susceptible of being ascertained exactly, it would be well-nigh impossible for the court to name exactly the amount which plaintiff is entitled to recover. To undertake to do so would be to assume the functions of a jury, and the result might be very unjust to the defendant, who would be bound by the result, while the plaintiff could accept or reject the amount named, as it suited

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him to do, for a court has no right to reduce a verdict of a jury, and render judgment for the reduced amount, unless the prevailing party consent to the reduction. *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110; 18 Enc. Plead. & Prac. 123. Looking at the matter from that standpoint, some courts hold that it is an invasion of the constitutional rights of the defendant to permit a remittitur, and affirm the judgment for the remainder, in actions for torts, and if the purpose of the court was to settle the exact rights of the parties under the evidence, it would be difficult to dispute the correctness of such decisions. But the court in such cases does not undertake to state the exact sum that plaintiff is entitled to recover, and makes no pretense of doing so. What the court undertakes to do is simply to name an amount so low that there can be no reasonable ground to believe that a jury of average judgment, after considering the evidence, would, when properly instructed as to the law, allow plaintiff a less sum than that named, and which amount the court can clearly see is not excessive. *Rueping v. Ch. & N. W. Ry. Co.*, 116 Wis. 625, 93 N. W. 843, 96 Am. St. Rep. 1013. The court must be certain not to put the amount too high, for as before stated, the defendant has no option in the matter, and must submit to the judgment allowed by the court, while the plaintiff has the right to reject the offer if he chooses to do so. There is then little danger in putting the amount low, and the court should always go down to a sum which it can feel certain that the defendant should pay, and which, under the evidence, the plaintiff is clearly entitled to recover. If it should be less than the plaintiff is entitled to under the evidence, the defendant is not injured, for, if the plaintiff accepts it, defendant then gets off with less than he was liable to pay. On the other hand, as plaintiff is not compelled to accept the amount offered, he has no ground for complaint that the court, instead of reversing the case outright on account of an error for which he is partly to blame, and forcing him to undergo a new trial, gives him the privilege of taking the sum named, and, by doing so, get some substantial compensation without the trouble and expense of further litigation.

The amount recovered in this case was \$2,000. The error in admitting evidence in reference to the size of the plaintiff's family, which consisted of 11 children, was, as we stated in the opinion, calculated to arouse the sympathies of the jury, and to enhance the amount of the verdict to some extent, though we do not think that it had any great effect on the verdict. But as this improper evidence was brought before the jury by plaintiff over the objection of counsel for defendant, if the judgment is affirmed it must be after such a substantial reduction as will clearly eliminate the effect of this evidence. Bearing this in mind, and guided by the rules above announced, a majority of us are of the opinion that a remittitur of \$750 will cure any possible prejudice caused by the admission of the evidence referred to. In naming \$1,250 as the amount for which plaintiff may have

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judgment, we do not undertake to say that it represents the exact amount of all the damages to which plaintiff is entitled. We name it as the sum for which, under the circumstances, we are willing that a judgment should stand, for the reason that we are fully convinced that such sum is not excessive, and that defendant will be in no respect prejudiced by a judgment for that amount. If plaintiff shall within one week enter a remittitur of the sum named, to take effect as of the date of the original judgment, the judgment may stand as to the balance; otherwise the case will be remanded for a new trial.

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(Supreme Court of Appeals of Virginia, Jan. 12, 1905.)

[49 S. E. Rep. 502.]

Live Wires—Care Required of Companies.*—Electric companies are not insurers against accidents, but they are held to a high degree of care in the construction and maintenance of their dangerous appliances.

Same—Injury to Child in Street—Presumption of Negligence.—The fact that a child was injured by picking up a live electric wire which had fallen to the sidewalk created a presumption of negligence on the part of the corporation owning and maintaining the wire.

Same—Same—Same—Rebuttal.—In an action for injuries sustained by a child by picking up a live electric wire that had fallen to the sidewalk, the testimony of a lineman that he looked over the wires every day, and that between 6 and 7 o'clock in the morning of the day of the accident he had looked over the wire in question, and had found it all right, was not sufficient to remove the presumption of negligence on the part of the corporation owning and maintaining the wire.

Same—Same—Same—Same.—The presumption of negligence which arises from an injury to a pedestrian in a public street from a broken electric wire is not overcome by testimony of employees of the one owning and maintaining the wire that the wire was properly constructed and put up.

Harmless Error.—Though a question asked a witness and his answer thereto are improper, if the propounder's case has been completely made out otherwise the error is harmless.

Same.—Though exception to the testimony of a witness is well taken, if the same fact is proved by other witnesses without objection the error is harmless.

Proximate Cause.—In an action for injuries to a child caused by his having picked up a live electric wire that had fallen to the sidewalk, a witness testified that two women were struck in the face by the wire, but not injured, and that the child grasped it at a point where it was not insulated, and that he thought he (the witness) took hold of it at a place where it was insulated without being hurt. Held, that such evidence did not show that a lack of insulation, and not the falling of the wire, was the proximate cause of the injury.

Personal Injuries—Medical Testimony.†—In an action for personal

*See foot-note appended to *Metropolitan St. Ry. Co. v. Gilbert* (Kan.), 15 R. R. R. 428, 38 Am. & Eng. R. Cas., N. S., 428.

†See foot-note appended to *Schutz v. Union Ry. Co.* (N. Y.), 15 R. R. R. 777, 38 Am. & Eng. R. Cas., N. S., 777.

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injuries, it was proper to permit the physician who attended plaintiff to testify as to the probable future effects of the injuries.

Same—Damages.†—In an action for personal injuries, the jury may consider, in addition to the expense and pain and loss already incurred and suffered, such as will reasonably and probably result as a consequence.

“De Minimis Non Curat Lex.”—On appeal in an action for personal injuries suffered by a child, the question whether there was error in permitting his mother to testify that she had spent \$7 for medicines was precluded by the maxim, “De minimis non curat lex.”

Appeal—Review.—Where no exception was taken to certain testimony when the question was asked the witness, and no bill of exceptions subsequently asked for, and there was no mention of such an assignment of error in the petition to the Supreme Court for a writ of error, the admissibility of the testimony could not be considered on appeal.

Same—Same.—The verdict of the jury in an action for personal injuries could not be disturbed on appeal where there was nothing to show that the jury were actuated by prejudice or partiality.

Error to Law and Chancery Court of City of Norfolk.

Action by Herbert Wesley Spratley, by his next friend, J. W. Spratley, against the Norfolk Railway & Light Company. Judgment for plaintiff, and defendant brings error. Affirmed.

HARRISON, J. On the 14th day of June, 1903—a clear, bright day—Herbert Wesley Spratley, an infant seven years of age, in company with his little sister and their little companion, Mabel Blair, were en route to the cemetery in Berkley, a suburb of the city of Norfolk. While passing along Liberty street, Herbert was injured by coming in contact with a charged electric wire owned by the plaintiff in error, which had fallen across the sidewalk about two hours before the accident. He was playing with his sister, and, thinking the wire was a switch, picked it up to hit her, with the result that he was severely shocked and burned about his head, hand, and leg, and was rendered unconscious. These injuries confined him to the bed for four weeks, and to the house for six weeks or more.

This suit was brought by the injured child, in the name of J. W. Spratley, as next friend, against the defendant company, to recover damages for the injuries mentioned; and, upon a demurrer to the evidence, judgment was rendered in favor of the plaintiff for the sum of \$2,000, the amount ascertained by the verdict of the jury. A writ of error was awarded, which brings the case to this court for review of errors alleged to have been committed at the trial.

It is contended that the demurrer to the evidence should have been sustained, because the defendant company was not shown to have been guilty of negligence.

This is a clear case for the application of the common sense rule of evidence expressed in the maxim *res ipsa loquitur*. While electric companies are not held to be insurers against accident,

†For the authorities in this series on the subject of the right to recover for future suffering, see *Chicago & M. Electric Ry. Co. v. Ullrich* (Ill.), 15 R. R. R. 405, 38 Am. & Eng. R. Cas., N. S., 405.

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still it is due to the citizen that such companies, permitted as they are to use for their own purposes the streets of a city or town, should be held to the exercise of a high degree of care in the construction and maintenance of the dangerous appliances employed by them, to the end that travelers along the highway may not be injured. The danger is great, and care and watchfulness must be commensurate with it. *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *City Elec. St. R. Co. v. Conery* (Ark.) 33 S. W. 426, 31 L. R. A. 570, and note page 578; *Joyce on Electricity*, §§ 438, 606. A consequence of this rule as to the high degree of care required in the use of a dangerous current of electricity is the presumption of negligence that is raised by the fact that a dangerous wire has broken and fallen into the street. But it is insisted that the testimony of the witness Wiggins Fuller, introduced by the plaintiff, showed that the defendant company had exercised due care, and that this proof did away with the presumption afforded by the accident itself, and rendered some other evidence of negligence essential to the plaintiff's case. The testimony mentioned is that of an adverse witness, called, as such, by the plaintiff to prove the ownership of the wire in question, and that the witness had repaired it. Upon cross-examination by the defendant company, the witness testified that he was not the inspector, but was a lineman; that he looked over the wires every day; and that between 6 and 7 o'clock in the morning of the day of the accident he had looked over this wire and found it all right.

This evidence was not sufficient to remove the presumption of negligence arising from the accident itself. Upon the whole evidence, the question was one for the jury.

In *Uggle v. West End St. R. Co.*, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481, the plaintiff was struck by part of an iron ear used to clasp a trolley wire to keep it in place around a curve over the defendant's track. There was no evidence of fault on the part of the defendant, other than that afforded by the accident itself. There was, however, evidence introduced by the defendant that it was not negligent, tending to show that the break was a clean one, bright in color and appearance; that the iron was sound all through, with no flaw or defect in it; that the whole apparatus was manufactured and put up by a manufacturer of the highest reputation; that the ear and guy constituted the best and strongest device known at the time for keeping trolley wires in place; that the defendant employed a corps of competent superintendents, foremen, and inspectors, who inspected the whole line weekly, including the cars and their attachments; and that this particular part of the line had been inspected within a week prior to the accident. Notwithstanding this evidence of due care on the part of the defendant, the plaintiff was not called upon to introduce other evidence of negligence than the accident itself; the court holding that upon the

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whole evidence the question was for the jury, and sustaining their verdict in favor of the plaintiff.

The presumption of negligence arising from an injury to a passer-by in a public street from a broken electric wire is not overcome, so as to require the case to be taken from the jury, by testimony of defendant's employees that the wire was properly constructed and put up. *Boyd v. Portland General Cement Co.* (Or.) 66 Pac. 576, 57 L. R. A. 619.

The declaration in the case at bar, after setting out the duty of the defendant company to so operate, control, and maintain its wires that they would not fall upon or come in contact with pedestrians lawfully upon and passing along a public street and highway, avers that the defendant, in disregard of its duty in that behalf, so carelessly and negligently maintained, controlled, and operated its wire that it was broken, and negligently permitted to fall from the poles, and negligently permitted to remain upon the street, charged with an electric current, and that by reason of this negligence the wire came in contact with the plaintiff, and he was thereby severely shocked, burned, etc. At the conclusion of the testimony of George W. Wiggins, a witness for the plaintiff, he was asked the following question: "Did you notice the condition of that wire—whether it was an old or new wire, or whether the insulation was on or off?" The witness answered that the insulation was off in a great many places, but that he did not know whether the wire was old or new. A motion to strike out this answer was overruled, and this action of the court is assigned as error.

It is contended that the declaration did not aver imperfect insulation as a ground of negligence, and that evidence tending to show lack of insulation could not, therefore, be introduced. On the other hand, it is most earnestly and with much force insisted that such evidence was admissible under the averment that the defendant negligently maintained its wire.

To properly maintain this electric wire would seem to include proper insulation, but it is insisted that the declaration limits the negligence in maintaining to preventing the wire from falling. In our view, a consideration of this question is not necessary. Under the rule *res ipsa loquitur*, the plaintiff's case was made out. The wire was down and across the sidewalk, and the child grasped it in the palm of his hand, and was injured. When the plaintiff has established the fact of ownership and control of the wire, and its dangerous condition, in a public street or highway, coupled with the accident, he has made out a *prima facie* case of negligence, and cast the burden upon the defendant to show that the wire was broken, and remained in such condition until the accident, without its fault. *Haynes v. Raleigh Gas Co.*, *supra*; *Western Union Tel. Co. v. State, for, etc.*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Willey v. Boston Elec. Co.*, 168 Mass. 40, 46 N. E. 395, 37 L. R. A. 723; *Trenton Pass. R. Co. v. Cooper* (N. J. Err. & App.) 37 Atl. 730, 38 L.

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R. A. 637, 64 Am. St. Rep. 592; Richmond Ry., etc., Co. v. Hudgins, 100 Va. 409, 41 S. E. 736.

The question and answer objected to were not essential to the plaintiff's case. His case was completely made out without it.

In Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361, 26 S. E. 850, it is held that although a question asked the witness, and his answer thereto, are illegal and improper, yet, if the propounder's case has been completely made out without such question and answer, and the admission of the answer did not and could not affect the result, it is harmless error, and the appellate court will not for this cause reverse the judgment of the lower court.

Further, the question and answer under consideration were without prejudice to the defendant company, because its own evidence tended just as strongly to show that the wire was not properly insulated.

In Taylor v. Mallory, 96 Va. 18, 30 S. E. 472, it is held that, although an exception to the testimony of a witness may be well taken, if the same fact is subsequently proved by other witnesses without objection the error will be deemed to be harmless. See, also, Va. & S. W. Ry. Co. v. Bailey, 103 Va. —, 49 S. E. 33.

The defendant further contends that its demurrer to the evidence should have been sustained because the proximate cause of the injury was the lack of insulation, and the declaration did not contain a specific allegation that the wire was not insulated. In support of this contention the defendant company relies upon its witness T. F. Newberry, who testified that two colored women passing along the sidewalk were struck in the face by the wire, and flung it out of the way without being injured. This witness also testified that he saw the little boy, while standing on the lot by the sidewalk, take hold of the wire, and that he grasped it at a point where it was not insulated. The witness further says that he thinks that he (the witness) took hold of the wire at a point where it was insulated without being hurt. The clear inference from this evidence introduced by the defendant is that the wire was not maintained as to its insulation; that the insulation was off at some points, and on at others; and consequently that the two colored women were not injured, because they were struck by the wire at a point where it was insulated, while the child, as shown by the witness, grasped the wire at a point where it was not insulated. We see nothing in this evidence to establish the contention that the lack of insulation was the proximate cause of the accident. The want of insulation would have been harmless had not the wire fallen. It was the negligence of the defendant company in allowing the wire to fall and remain across the sidewalk, and not the lack of insulation, that was the proximate cause of the accident. Had not the wire fallen, it could have remained on the pole in the air, uninsulated, indefinitely, without injury to any one. So that it was the falling of the wire that brought about the injury sustained by the plaintiff.

It is further contended by the plaintiff in error that the court

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below erred in allowing Dr. Lankford to testify as to the probable future effects of the injuries sustained by the plaintiff, and in not striking out evidence as to such future effects.

In *Watson on Personal Injuries*, § 604, p. 720, it is said: "An exception to the rule excluding opinion evidence exists where it is desired to show by properly qualified experts the nature or extent of the plaintiff's injuries, and their probable permanency or the reverse. 'There is,' indeed, it has been said, 'no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future.' It is competent, therefore, for the physician who attended the plaintiff during the period of treatment for the injuries received to give his opinion as to the effect of the injuries received by the plaintiff upon his future condition, or to state from his experience and medical knowledge the probability of the recurrence of inflammation in an injured muscle. And a physician may also testify, in a general way, that there is a probability that certain conditions caused by the injuries, and shown to exist at the time of the trial, will produce still more serious results in the future, or may be requested to express his opinion as to the probable effect of the injuries on the plaintiff's general health, or may be asked whether, in his opinion, on the facts shown, if certain conditions exist two years after the accident, they will probably be permanent."

In *Toledo Ry. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71, it was held to be proper for qualified experts to testify as to the probable effect of the injuries received by the plaintiff upon his future condition.

Any evidence tending to show the character and extent of the injury, and its probable results, and the probability of an injury leaving permanent effects of an injurious nature, is competent. A question, therefore, to a physician, asking him to state, from his experience and medical knowledge, the future effects likely to result from an injury, is proper. *Filer v. N. Y. R. Co.*, 49 N. Y. 42.

This court, in the case of *Richmond P. & Power Co. v. Robinson*, 100 Va. 394-400, 41 S. E. 719, in discussing the measure of damages, said the amount in question could not be considered as unreasonable compensation for such physical pain and suffering as the plaintiff experienced, or was likely to experience. Such inconvenience, discomfort, and mental suffering as might have been entailed upon him by the injuries and consequent disability were also to be considered.

In the light of these authorities, we are of opinion that there was no error in permitting the witness Dr. Lankford to testify as to the probable future effects likely to result from the injuries sustained by the plaintiff.

It is further asserted that the court erred in its instruction to the jury touching the measure of damages. The objection urged to this instruction is that it told the jury they should take into

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consideration, in addition to the expenses and pain and loss already incurred and suffered, such as would naturally, reasonably, and probably result to the plaintiff as a consequence of his injuries.

The objection made to this instruction has been practically disposed of by what has been said in dealing with the last-mentioned assignment of error, in regard to the introduction of expert evidence as to the probable future effects of the injuries sustained by the plaintiff.

In *Watson on Personal Injuries*, § 384, p. 478, the learned author, in discussing the propriety of an instruction embodying the element of damage here objected to, says: "But it is not perceived why the probability or likelihood or reasonable expectation of the future suffering does not satisfy the rule of reasonable certainty, and such is believed to be the weight of the best considered cases. An instruction so worded, indeed, would seem to be preferable to one simply stating the requirement to be reasonable certainty, because in the former case the jury would be advised in some measure as to what constitutes reasonable certainty. It has been held, accordingly, that a jury may be properly instructed to give damages for such future suffering as the plaintiff will probably endure, or 'in any reasonable probability will hereafter sustain.' And in an action for personal injuries, where proof of future effects with certainty was impossible, and reasonable probabilities were necessarily the basis of the medical opinions, it was held proper to charge that damages could be awarded for 'such consequences as are reasonably likely to ensue,' and all pain and suffering which the plaintiff, 'in reasonable probability, will hereafter sustain.' In the Supreme Court of Arkansas the following instruction was approved in an action for assault and battery: 'If the jury find for the plaintiff, it will be their duty to consider whether or not the plaintiff is likely to suffer in the future from the effects of the wound received at the hands of defendant; * * * and, if they find in the affirmative, it will be their duty to assess a sum equivalent to the injuries and sufferings, as they find from the evidence, he is likely to suffer in the future.'"

We are of opinion that in the case at bar the court committed no error in telling the jury that they could take into consideration, in assessing damages, "such as will naturally, reasonably, and probably result to the plaintiff as a consequence of his injuries."

Mrs. Rosa Spratley, the mother of the plaintiff, introduced on his behalf, was asked, "Has any money been expended for medicine?" and answered, "I spent, I think, in the neighborhood of seven dollars. I don't know whether it was that much, or any more. I did not keep a strict account." It is contended in the oral argument before this court that the admission of this question and answer was error, for which the judgment should be reversed, because the plaintiff could not recover except for such

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expenses as he had himself incurred, whereas the answer showed that the mother had expended the sum mentioned.

If consideration of this question were not precluded by the maxim, "De minimis noncurat lex," the contention would not be tenable, in view of the instruction given, which expressly limits the consideration of the jury to such necessary expenses as the plaintiff himself incurred for medicine. But apart from these considerations, this question cannot be raised for the first time in oral argument before this court. No exception was taken to the evidence at the time the question was asked. No bill of exception was subsequently asked for on the subject, and there is no mention of such an assignment of error in the petition to this court for a writ of error. It is well settled that under such circumstances it is too late to now make the introduction of this evidence a ground for setting aside the verdict of the jury.

It is further assigned as error that the damages allowed by the verdict of the jury are excessive.

There is not a suggestion in the record that the jury were actuated by prejudice or partiality, and therefore, upon well-settled principles, their verdict cannot be disturbed. *Norfolk & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Richmond Ry. & Elec. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839. In the last-named case it is said, "No method has yet been devised, nor scales adjusted, by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be"; that, unless the finding of the jury is so great as to furnish ground for believing that they were actuated by partiality or prejudice, the court should not, under the well-settled rule in this state, disturb the verdict.

Upon the whole case, we are of opinion that the judgment complained of must be affirmed.

BARTLETT v. WORCESTER CONSOL. ST. R. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 19, 1905.)

[75 N. E. Rep. 706.]

Street Railroads—Injury to Bicyclist—Contributory Negligence.*—
A person riding a bicycle at about noon in a crowded city street, who,

*For the authorities in this series on the question whether it is contributory negligence to fail to stop, look, and listen before attempting to cross street railway tracks, see foot-notes appended to *Markowitz v. Metropolitan St. Ry. Co. (Mo.)*, 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; *Los Angeles Traction Co. v. Conneally (C. C. A.)*, 16 R. R. R. 107, 39 Am. & Eng. R. Cas., N. S., 107; foot-notes appended to *Vrooman v. North Jersey St. Ry. Co. (N. J.)*, 15 R. R. R. 393, 38 Am. & Eng. R. Cas., N. S., 393; *Lambert v. Southern Pac. R. Co. (Cal.)*, 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575.

For the authorities in this series on the question of the care required of a traveler at a crossing where the view is obstructed, see foot-note

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when about to cross a street car track, looked to ascertain whether a car was coming, and, his view of an approaching car being obstructed took his chances, and while crossing the track was struck by the car, was guilty of contributory negligence.

Exceptions from Superior Court, Worcester County; Edward P. Pierce, Judge.

Action by Emerson E. Bartlett against the Worcester Consolidated Street Railroad Company. A verdict was directed for defendant, and plaintiff excepted. Exceptions overruled.

Sheehan & Cutting, for plaintiff.

F. H. Dewey, Chas. C. Milton, and Chandler Bullock, for defendant.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff, resulting from his coming into collision with an electric car of the defendant on Main street in Worcester. At the trial in the superior court, at the close of the plaintiff's evidence, a verdict was ordered for the defendant; and the case is before us on the plaintiff's exceptions.

We are of opinion that the ruling was right. At the place of the accident Main street runs north and south, and there are two tracks of the defendant in the street. The plaintiff was going south, riding on a bicycle, and a car passed him going in the same direction, stopping at Austin street. The plaintiff testified that he was then 12 or 15 feet behind the car, and turned to cross the track; that he looked and listened, to ascertain whether a car was coming on the other track; that he could not see, because the car that had stopped obstructed his view; that he heard nothing; that he took his chance, and was struck by a car on the other track. It appeared that the plaintiff's bicycle struck the forward truck of the car, and that the car was going slowly, as it stopped within 10 feet. We find very little evidence, if any, of negligence on the part of the defendant. The evidence was entirely negative on the question whether the gong was sounded, and there was no evidence that it was a usual place to sound the gong. The plaintiff testified that he did not see the car until he was within five feet of it, and the motorman could not see him sooner. The sounding of the gong then would have been of no avail. If there was any evidence for the jury on this branch of the case, it is clear that the plaintiff was not in the exercise of due care. The accident happened soon after 12 o'clock, noon, on the main street of a large city. The case falls within *Saltman v. Boston Elevated Railway*, 187 Mass. 244, 72 N. E. 951, where it is said: "The plaintiff's looking while his view was

appended to *Coffee v. Pere Marquette R. Co.* (Mich.), 16 R. R. R. 772, 39 Am. & Eng. R. Cas., N. S., 772; foot-note appended to *Goldmann v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 14 R. R. R. 582, 37 Am. & Eng. R. Cas., N. S., 582; *Giardina v. St. Louis & M. R. Ry. Co.* (Mo.), 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579; foot-notes appended to *Golinvaux v. Burlington, etc., R. Co.* (Iowa), 14 R. R. R. 185, 37 Am. & Eng. R. Cas., N. S., 185.

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obstructed by a passing car did him no good. Common experience teaches us that it is unsafe to cross a double line of tracks without looking to see whether a car is approaching on either line, and it also teaches us that, if the view is temporarily obstructed, one should wait until the view is unobstructed." See, also, the cases cited in *Saltman v. Boston Elevated Railway*, *supra*.

Exceptions overruled.

FLINT v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, Sept. 20, 1905.)

[88 S. W. Rep. 1055.]

Appeal—Record—Questions Reviewable.—Refusal to allow a deposition to go to the jury cannot be reviewed; the bill of exceptions not containing the deposition, nor showing that the court passed on the exceptions filed to it.

Bill of Exceptions—Supplemental Bill.—An instrument cannot be considered as a supplemental bill of exceptions; it not having the signature or approval of the trial judge.

Railroads—Trespassers on Track—Duty of Company.*—All that a railroad company owes to a trespasser on its track is that after the trainmen discover him, they exercise reasonable care and all reasonable means at their command to stop the train in time to prevent accident.

Appeal—Conflicting Evidence.—A verdict cannot be disturbed on appeal as against the weight of evidence, but only where there is no evidence to support it.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Lena Maud Flint, an infant, by next friend, against the Illinois Central Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Taylor & Lucas, for appellant.

Wheeler, Hughes & Berry, J. M. Dickinson, and Trabue, Doolan & Cox, for appellee.

*See foot-note appended to *Dotta v. Northern Pac. Ry. Co.* (Wash.), 15 R. R. R. 146, 38 Am. & Eng. R. Cas., N. S., 146; foot-notes appended to *Gregory v. Wabash R. Co.* (Iowa), 15 R. R. R. 457, 38 Am. & Eng. R. Cas., N. S., 457; *Manning v. Illinois Cent. R. Co.* (Ky.), 15 R. R. R. 178, 38 Am. & Eng. R. Cas., N. S., 178; foot-note appended to *Kendrick v. Seaboard Air Line Ry.* (Ga.), 15 R. R. R. 175, 38 Am. & Eng. R. Cas., N. S., 175; *Sentell v. Southern Ry.* (S. Car.), 15 R. R. R. 161, 38 Am. & Eng. R. Cas., N. S., 161; foot-note appended to *Central of Georgia Ry. Co. v. Williams Buggy Co.* (Ga.), 14 R. R. R. 171, 37 Am. & Eng. R. Cas., N. S., 171; foot-note appended to *Koegel v. Missouri Pac. Ry. Co.* (Mo.), 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358; *Maysville & B. S. R. Co. v. McCabe* (Ky.), 13 R. R. R. 459, 36 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397.

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SETTLE, J. The appellant, Lena Maud Flint, an infant, and her next friend, by this action sought to recover of appellee, Illinois Central Railroad Company, \$2,000 in damages for injuries to her person, alleged to have been received by the negligence of its servants in charge of a freight train which overtook her while crossing appellee's trestle at Dawson Springs, and to avoid collision with which she was compelled to jump from the trestle, a distance of 22 feet, to the ground, whereby she broke her wrist, wrenched her back, and received other injuries of a permanent character. Appellant's cause of action was based upon the theory that her peril while upon the trestle was known to the engineer of appellee's approaching freight train in time for him to have stopped the train before it reached her, which, if done, would have prevented her injuries. The defense interposed by appellee's answer was that in going upon the trestle appellant was a trespasser; that those in charge of the approaching train were under no duty to keep a lookout for a mere trespasser, such as appellant, or to give her warning of the coming of the train, but only to exercise reasonable care to avoid injury to her after discovering her peril; that such care was used when and as soon as her presence on the track became known to those in charge of the train, but that, there not being time to stop the train after their discovery of her peril, her jumping from the trestle and consequent injuries were unavoidable as far as appellee was concerned; and, finally, that in the matter of receiving her injuries appellant was herself guilty of negligence, but for which they would not have been received. The trial resulted in a verdict and judgment for appellee, of which, and the refusal of the lower court to grant her a new trial, appellant now complains.

It is contended by counsel for appellant that the trial court erred to her prejudice in refusing to her the right to read upon the trial the deposition of Ben Dame, and also erred in giving and refusing instructions. As to the deposition of Dame, it is sufficient to say that the bill of exceptions signed and approved by the circuit judge does not show that the exceptions filed to the deposition were ever passed upon by the court, nor does it contain the deposition in question. Consequently we are unable to say whether it should have been allowed to go to the jury as competent evidence or not. We are not at liberty, either, to consider the alleged supplemental bill of exceptions, purporting to contain a copy of Dame's deposition, which appellant has offered to file in this court. As it does not contain the signature or approval of the circuit judge in whose court the trial was had, it is in no sense to be treated as a part of the record upon this appeal, and can therefore have no effect upon the decision of the appeal by this court.

A careful examination of the instructions given by this court convinces us that they are free from error. By them the jury were in substance told that, unless they believed from the evidence that appellee's engineer, in charge of the locomotive of the train by which appellant was forced to jump from the trestle,

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after discovering her peril, could by the exercise of reasonable care and all reasonable means at his command have stopped the train in time to have prevented her injuries, they should find for appellee. This was certainly a correct statement of the law, and presented the only hypothesis upon which a recovery would have been allowed. Nor was it error for the instructions to state that in going upon the trestle appellant was a trespasser, and that appellant's servants in charge of the train were under no duty to keep a lookout for trespassers, or to give them warning of the approach of the train by the sounding of the engine and whistle or ringing of the bell. Neither was it improper for the instructions to advise the jury in substance that appellant was not entitled to recover because of the defective whistle upon appellee's engine, as no issue was made, or could properly have been made, by the pleadings on that score, in view of appellant's attitude as a trespasser upon appellee's right of way. We are further of opinion that the instructions asked by appellant were properly refused by the trial court, for they ignored the fact that appellant was a trespasser, and held appellee and its trainmen to the same degree of care in respect to her safety that would legally be required of them toward one rightfully upon appellee's trestle or track. In brief, we think the instructions given by the court were on the whole reasonably accurate and explicit in their statement of the law applicable to the state of case presented by the pleadings and proof, and left nothing unsaid that was required for the guidance of the jury.

It is not for us to say whether or not the verdict of the jury is in accord with the weight of the evidence. In the absence of error on the part of the trial court, we are without authority to disturb the verdict of a jury, unless convinced that it is wholly unsupported by evidence, or is the result of passion or prejudice on the part of the jury, neither of which grounds exist in this case. We have, however, found the evidence conflicting; that of appellant conducing to prove that her presence upon the trestle and consequent peril were known to appellee's engineer in sufficient time for him to have stopped the train before it reached her. Upon the other hand, appellee's evidence tended to prove that the train could not have been stopped after the discovery of her peril by the trainmen in time to have prevented her injuries. It was, however, the province of the jury to weigh the evidence and determine in whose favor it preponderated, and as, in arriving at a verdict, they were properly guided by the instructions given by the trial judge, their decision of the case must be accepted by this court and submitted to by the parties. Wherefore the judgment is affirmed.

YATES v. ILLINOIS CENTRAL R. CO.

(Court of Appeals of Kentucky, Sept 21, 1905.)

[89 S. W. Rep. 162.]

Railroads—Trespassers on Tracks—Duty to Avoid Injury.*—A railroad owes no lookout duty to a trespasser on its track, but merely owes him the duty of using reasonable care to save him after discovering his peril.

Same—Injury to Trespasser—Contributory Negligence.—Plaintiff was injured while trespassing upon a side track of a railroad. He knew at the time that the side track was used for the purpose of enabling trains to pass each other, and knew that trains were about to pass, because he saw one standing near and another approaching the place where the accident occurred. Regardless of these facts, he walked along the track, apparently oblivious to the importance of exercising care for his safety. Held, that the injury was the result of plaintiff's own negligence.

Appeal from Circuit Court, Lyon County.

"Not to be officially reported."

Action by S. C. Yates against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. M. Worten and W. L. Krone, for appellant.

Trabue, Doolan & Cox, J. M. Dickinson, E. H. James, and Darby & Gates, for appellee.

PAYNTER, J. The appellant, when about 65 years of age, was struck by one of appellee's trains on its side track at Eureka, in Lyon county, Ky., and thereby sustained the injuries to recover damages for which this action was instituted. He was a trespasser upon the track of the appellee. Under the well-settled rule of this court the appellee owed him no duty, except to use reasonable care to save him after his peril was discovered. Appellant knew that the side track was used for the purpose of enabling trains to pass each other. He knew that trains were to pass at the time he placed himself in the perilous position, because he admits that he saw both of them; one standing near and the other approaching the place where the accident happened. Regardless of this condition, he moved along the track, apparently oblivious to the importance of exercising care for his safety. The appellant introduced the engineer who was on the train which struck him, who testified that he did not discover his perilous position on the track until just before the engine struck him, and that he did all that could have been done to keep the train from striking him. As the appellant was a trespasser, the appellee did not owe him a lookout duty; and, as the engineer did all he could to save the appellant after his peril was discovered, the court properly gave the jury a peremptory instruction to find for the appellee. There was no evidence which tended to

*See foot-notes appended to *Clemans v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

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show negligence upon the part of those in charge of the train, nor were there any facts proven from which negligence could be inferred. We are of the opinion that the facts show that the statement of appellant the day after he was injured, to the effect that the injury was the result of his own negligence, was correct.

The judgment is affirmed.

LEXINGTON ST. RY. v. STRADER. SAME v. MCKENNA.

(Court of Appeals of Kentucky, Oct. 11, 1905.)

[89 S. W. Rep. 158.]

Continuance—Surprise at Trial—Testimony of Witnesses.—On the trial of an action against a street railroad for injuries to a traveler in a collision with a car, plaintiff and witnesses testified that immediately after the accident the motorman came from the car to where plaintiff had fallen and stated that the reason he had not sounded his gong or stopped the car was because the gong and brake were out of repair. The motorman had left the service of the company and resided in another state, where his deposition was taken, without plaintiff asking any question on cross-examination indicating that he would rely on the testimony as to the motorman's alleged statement. The company's president filed an affidavit to the effect that it was surprised at plaintiff's evidence, and could show by the motorman that he did not make the statement testified to. Held, that the court, on the company's motion, should have discharged the jury and continued the case, to give it opportunity to rebut plaintiff's evidence.

Evidence—Res Gestæ—Statements after Act Causing Injury to Another.*—The statement of the motorman of a car which had collided with a traveler that the reason he did not sound the gong or stop the car was because the gong and brake were out of repair, made immediately after the accident and before he had time to manufacture a false statement with regard to the cause of the accident, was a part of the res gestæ.

Street Railroads—Injuries to Traveler—Instructions—Contributory Negligence.†—A street railway company, when sued for injuries received by a traveler in a collision with a car, is entitled to an instruction that, though it was negligent, yet, if the traveler was also negligent and his negligence contributed to the accident, so that but for it he would not have been injured, there can be no recovery.

Appeals from Circuit Court, Fayette County.

"Not to be officially reported."

Separate actions by W. P. Strader against the Lexington

*For the authorities in this series on the question whether the statements of railroad employees and agents are res gestæ, in actions against their respective masters, see foot-notes appended to *South Covington & C. St. Ry. Co. v. Riegler* (Ky.), 15 R. R. R. 256, 38 Am. & Eng. R. Cas., N. S., 256; *Havens v. Rhode Island S. Ry. Co.* (R. I.), 13 R. R. R. 549, 36 Am. & Eng. R. Cas., N. S., 549.

†For the authorities in this series on the question whether there may be a recovery on account of simple negligence where there was also contributory negligence, see foot-note appended to *Feitl v. Chicago City Ry. Co.* (Ill.), 14 R. R. R. 798, 37 Am. & Eng. R. Cas., N. S., 798.

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Street Railway and by Charles McKenna against the same defendant. From a judgment for both plaintiffs, defendant appeals. Reversed.

Morton, Webb & Wilson and Stoll & Bush, for appellant.

Allen & Duncan, for appellees.

BARKER, J. W. P. Strader and Charles McKenna were injured in a collision which occurred between one of appellant's cars and a vehicle which they were driving, to recover damages for which they instituted actions in the Fayette circuit court, alleging the collision and the resulting injury to them to have been caused by the negligence of the employees of appellant in charge of the car. The answer placed in issue the allegation of negligence of appellant's employees and alleged the contributory negligence of appellees. These affirmative allegations were denied by reply, and the issues thus made up. The cases were tried together, and resulted in a verdict in favor of Strader for the sum of \$500, and in favor of McKenna for the sum of \$350. To reverse the judgments based upon these verdicts, the corporation is here on appeal. As the facts in the cases were identical, by agreement one bill of exceptions is used on both, and we will consider the two appeals together.

Strader and his employee, McKenna, had driven along Main street, in Lexington, Ky., to a warehouse belonging to the former and which was being prepared for the storage of whisky. The vehicle they were driving seems to have been what is commonly called a "jersey," or grocery wagon, having a covered top. Strader alighted from the wagon and went into the warehouse for the purpose of supervising or looking after the repairs being made therein. During this time, McKenna sat in the wagon awaiting his return. After finishing his business in the warehouse Strader returned to the wagon, which McKenna proceeded to turn around in order to go back up Main street, from whence they came. To do this it was necessary to cross the track of the appellant corporation. While the wagon was on the track, one of the cars of the appellant was propelled along, collided with the wagon, and turned it over, throwing both of the occupants out, who, by falling on the hard pavement, were seriously and painfully, but not permanently, injured. The wagon and mule were both damaged. No serious contention is made that the verdicts are excessive. We think they show, on the contrary, a careful conservatism on the part of the jury.

Without making a more extended preliminary statement of the facts, we will take up the questions of law upon which appellant relies for a reversal. When the trial was had, the motorman, Goodman, who was in charge of appellant's car at the time of the accident, had left its service and was residing in Cincinnati, Ohio, where his deposition was taken prior to the trial. While appellees' evidence was being adduced, they both, and one or two of their witnesses, testified that immediately after the accident Goodman came from his car to where appellees had

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fallen, and there stated to them, or in their presence, that the reason he had not sounded his gong or stopped the car before the accident was because the gong and brake of the car were both out of repair. This testimony was allowed as a part of the *res gestæ* over the objection of appellant, whereupon it filed the affidavit of its president, stating that it was surprised at the evidence; that it had no knowledge that such evidence was to be introduced, and that, when the deposition of its former motorman, Goodman, had been taken in Cincinnati, no question was asked on cross-examination to indicate that appellee would rely on such testimony; that, if information had been conveyed to appellant that such evidence would be adduced, it could have shown by Goodman that he made no such statement as was testified to by appellees and their witnesses. Based upon this affidavit, a motion was made to discharge the jury and reassign the case to another day for trial, in order that appellant might have the opportunity to rebut the testimony as to the admission of Goodman in question. This motion the court overruled, and of this ruling appellant now complains. We think the trial court erred in overruling appellant's motion to discharge the jury and continue the case for another day in order to give appellant an opportunity to rebut, if it could, the testimony of the witnesses for appellees as to the admission of the motorman, Goodman.

In the case of *McCall v. Hitchcock*, 9 Bush, 66, it is said: "It is a general principle of practice that 'when a party or his counsel are taken by surprise, whether by fraud or accident, on a material point or circumstance which could not reasonably have been anticipated, and when want of skill, care, or attention cannot be justly imputed, and injustice has been done, a new trial will be granted.'" The case of *Louisville & Nashville R. R. Co. v. Bickel*, 97 Ky. 222, 30 S. W. 600, was in principle similar to that at bar. The railroad company sought to recover certain leased premises which had been sublet by its lessee, Bickel, to one Pesold, in violation of a covenant against subletting without the consent of the lessor. Upon the trial of the case the appellee Bickel testified that, before the assignment by him of the lease to Pesold, M. H. Smith, the president of the Louisville & Nashville Railroad Company, was made acquainted with Bickel's purpose to sublet a part of the leased premises, and that he (Smith) consented thereto, that Smith was in the habit of passing the premises in going to his country home, and that the business sign of the appellee Pesold was on the blacksmith shop. After this testimony was given the counsel for the railroad filed his affidavit, stating that it was a complete surprise to him, that M. H. Smith was then in New York, and would not return until the following week, and moved the court to continue the case on the ground of surprise. The court overruled the motion and proceeded with the trial. Upon the motion for a new trial the affidavit of M. H. Smith was filed, stating that the testimony of Bickel as to his knowledge of the subletting of the premises was absolutely and entirely untrue, that he never suspected Bickel

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would give such testimony, hence never anticipated he would be needed as a witness, and was absent from Louisville when the trial took place. This court reversed the judgment alone for the error of the trial court in refusing to continue the case in accordance with the railroad's motion. In the case of *Craft v. Barron* (decided Oct. 4, 1905) 88 S. W. 1099, this state of facts arose: "The plaintiff, some months before the trial, had taken the deposition of his agent, Idol, with whom the transaction was had; both sides interrogating him as to the misrepresentation relied on. On the Saturday before the trial took place the defendant had taken the depositions, at Danville, Ky., of White and Chrisman, by whom he proved that Idol's character for truthfulness was bad. When the case was called for trial, the plaintiff announced that he was not ready on account of these two depositions, which had been taken on the preceding Saturday. The court ruled that he would not compel the plaintiff to try, but would give him time to take proof to meet the evidence of White and Chrisman. The defendant thereupon withdrew the depositions of White and Chrisman, agreeing not to read them on the trial. The parties then announced ready, and the trial was begun. On the next day, while the trial was in progress, the plaintiff saw White and Chrisman in the courtroom, and thereupon moves the court to set aside the swearing of the jury and continue the case. The court overruled the motion, and of this he complains. If the defendant had not taken the depositions of White and Chrisman, but had brought the witnesses into the courtroom, as he did on the second day of the trial, the plaintiff would have been in no better shape than he was when the depositions were taken and withdrawn. If he had filed his affidavit that he was taken by surprise, and that, if given time, he could get proof sustaining the character of Idol, it would have been proper for the court to set aside the swearing of the jury and continue the action. But this he did not do. He did not make any showing that, if given time, he could get any evidence he did not then have. He simply stood upon his right to object to White and Chrisman testifying. He did not ask at any time during the trial a continuance at his cost, nor did he make any showing that he was surprised by the attack on Idol's character, and under the circumstances the court properly refused to set aside the swearing of the jury and continue the case."

In the case at bar the appellant did file its affidavit showing its surprise, and also that, if given time, it could truthfully rebut the evidence of its motorman Goodman's admission. The appellee knew at the time Goodman's deposition was taken in Cincinnati that they would introduce and rely upon his admission as to the bad condition of the gong and brake; but of this appellant was in ignorance. When they failed to interrogate Goodman as to this supposed admission, we think it clear that appellant had the right to claim surprise, when the evidence of it was adduced upon the trial. The admission was very material to appellee's cause of action, and very damaging to appellant's

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defense. That it had great weight with the jury there can be no reasonable doubt. It seems to us that justice requires that appellant be given the opportunity to rebut this evidence, if it can.

We think the evidence of the admission of Goodman was competent as a part of the *res gestæ*. He left his car immediately after the collision occurred, and came to the appellees, who were being taken from the street where they had fallen. If he made the admission at all, it was within a few seconds after the accident, and before he had time to concoct or manufacture a false statement with regard to the cause of the accident; and, as decided in the cases of *McLeod, Receiver, v. Ginther's Adm'r*, 80 Ky. 399, and *L. & N. R. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866, the admission was a part of the *res gestæ*, and therefore competent.

The instructions of the court, as given, seem to state the law of the case as far as they go; but, without expressly approving them, in response to the insistence of appellant that its rights on the highway be declared in our opinion, we leave their final approval open, with the suggestion that in the case of *Greene v. Louisville Railway Co.*, 84 S. W. 1154, 27 Ky. Law Rep. 316, the question of the rights of the operators of street railways in the public streets of a city as against the drivers of vehicles is discussed and decided, and that, if the instructions given vary from the principles enunciated therein, they should be made to conform thereto. Appellant was entitled to an instruction on contributory negligence, and the jury should have been told, substantially, that, although its employees may have been negligent as charged in the petition, yet, if appellees were also negligent, and their negligence so contributed to the accident that but for it they would not have been injured, the law was for the appellant.

For the reasons given, the judgments are reversed for proceedings consistent with this opinion.

CHAMBERS v. MILNER COAL & RY. CO.

(Supreme Court of Alabama, Feb. 16, 1905.)

[39 So. Rep. 170.]

Negligence—Death of Child—Action by Administrators—Contributory Negligence—Pleading.—Demurrers to pleas setting up contributory negligence in an action by an administratrix for death of a child, on the ground that they do not aver that "plaintiff" had sufficient discretion, are properly overruled.

Same—Harmless Error.—The overruling of demurrers to pleas of contributory negligence in an action for death of a child is harmless; plaintiff having got the benefit of the principle claimed as to necessity of pleading and proving requisite intelligence of the child in the charge.

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Same—Instruction.*—An instruction, in an action for death of a child 10 years old, that, if the jury believe he was of sufficient intelligence to know the danger, verdict should be for defendant, is proper, where, had an adult acted as he did, he would have been guilty of contributory negligence.

Same—Willful Negligence—Powder Magazine.—There can be no recovery, on the ground of willful, wanton, or reckless conduct, for death of a child, where defendant had a powder magazine in the woods 150 yards from the road, and 6 feet from a path seldom traveled, though the door was left open; the powder being caked, from having been wet, so that it would not explode, and intestate having trespassed on the grounds and set fire to the powder, and his clothes having caught fire therefrom.

Same—Negligence—Instructions.†—An instruction, in an action for death of a child who trespassed on defendant's land and was burned from setting fire to powder in a magazine in the woods, that defendant had the right to store and keep the powder in the magazine, and had no absolute duty to keep the magazine locked or guarded against access by children or others, unless the situation and surroundings would reasonably indicate to an ordinary prudent person that it might be tampered with and ignited, so as to cause injury to children or others, and that defendant's duty in this regard depended entirely on the surrounding circumstances in evidence, of which the jury were the judges, is proper.

Appeal—Bill of Exceptions.—Refusal of a charge not appearing in the bill of exceptions cannot be reviewed.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by E. C. Chambers, administratrix of Samuel A. Paschal, deceased, against the Milner Coal & Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

This action was brought by E. C. Chambers, as administratrix of the estate of Samuel A. Paschal, deceased, and sought to recover damages for the death of the intestate, who was alleged to have been a child of 10 years of age. The complaint contained originally two counts; the first alleging simple negligence of the defendant in keeping a dangerous quantity of powder in an open, unguarded magazine, near a road in the neighborhood of the deceased, which was passed daily by a large number of people. It further alleged that the defendant knew or should have known that children would be attracted to the magazine, and that the intestate was so attracted, and lost his life by reason of

*As to whether children can be chargeable with contributory negligence, see *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154; foot-notes appended to *Poland v. Union R. Co.* (R. I.), 12 R. R. R. 648, 35 Am. & Eng. R. Cas., N. S., 648; *St. Louis, I. M. & S. Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807; foot-notes appended to *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307.

†For the authorities in this series on the subject of the care due trespassing children, see foot-notes appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154; *Nashville, etc., Ry. Co. v. Harris* (Ala.), 14 R. R. R. 562, 37 Am. & Eng. R. Cas., N. S., 562; foot-notes appended to *Denison & S. Ry. Co. v. Carter* (Tex.), 14 R. R. R. 129, 37 Am. & Eng. R. Cas., N. S., 129.

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an explosion of the powder in the magazine. The second count based the claim upon the willful, wanton, or intentional negligence of the defendant. To the original complaint the defendant filed four pleas; the first being the general issue, and the others contributory negligence. Afterwards the plaintiff amended her complaint by adding a third count, which was similar to the first count, except that the death of her intestate was alleged to have been caused by the ignition and explosion or burning of the powder. The defendant put in no pleas purporting to answer the complaint as amended, but for answer to the third count interposed the same pleas as had been filed to the original complaint, and a further plea, numbered 2 in the record, setting up that the magazine was on the private property of defendant and owned exclusively by it; that the deceased was a trespasser thereon, and the powder was ignited by the intestate, or by a companion with his knowledge and co-operation. It at the same time filed separate pleas to the first and second counts of the complaint, being the same as filed to the original complaint, with an additional plea, numbered 5, which additional plea was identical with that filed to the third count of the complaint. Demurrers were interposed by the plaintiff, the substance of which is shown by the opinion. After demurring to the second, third, and fourth pleas, as noted in the opinion, the plaintiff demurred to the second, third, fourth, and fifth pleas to the first and second counts of the plea, wherein she put in the same grounds as before submitted, except that the words "plaintiff's intestate" were used in place of the word "plaintiff." The testimony tended to show: That the deceased, Sam Paschal, was about 10 years of age. That, when injured, he was playing, with a companion of about 13 years of age, at the magazine of the defendant. The door of the magazine was open, and Sam Paschal suggested that they get some of the powder and see it would burn. They did so, and the powder burned without exploding, and set fire to other powder in the magazine, which set fire to the clothing of the deceased, from the effects of which he died that night. It was shown that some time before the powder had been so damaged from an overflow from an adjacent creek that it was nonexplosive, and merely combustible. There was much evidence bearing on the mental capacity of the deceased. Any further facts necessary to an understanding of the opinion are shown thereby. The court, at written request of the defendant, gave charges numbered and in words as follows: "(3) If the jury believe the evidence, they cannot find a verdict for the plaintiff under the second count of the complaint." "(5) If the jury believe from the evidence that Sam Paschal was of sufficient intelligence to know and appreciate the danger from a powder explosion, or the danger that would result from setting fire to this powder, and that, if set fire to, it was likely to cause death, then you must find a verdict for the defendant." "(7) The defendant had the right to store this powder in the magazine, and keep it there, and there was no absolute duty

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resting on it to keep it locked or guarded from access by children or others, unless the situation and surroundings would reasonably indicate to an ordinarily prudent person in charge of such magazine that it might be tampered with and ignited, so as to cause injury to children or others. The duty of the defendant in this regard depends entirely on the surrounding circumstances which may be in evidence, and of this the jury are the judges." There was judgment for the defendant, from which the plaintiff takes this appeal.

John W. Tomlinson, for appellant.

James Weatherly, for appellee.

SIMPSON, J. This was an action for the death of a boy, about 10 years of age, caused by the explosion or burning of powder in a magazine. The second, third, and fourth pleas set up the defense of contributory negligence in the intestate, and demurrers were interposed to said pleas, assigning, among other causes, "that it was not averred that the plaintiff had sufficient discretion," etc., and "that the plaintiff was about the age of 10," etc., and in each cause of demurrer refers to the "plaintiff." As the plaintiff in this case is E. C. Chambers, as administratrix, and there was no necessity of any such allegations, as to her the demurrers were properly overruled.

The sixth assignment of error is sustained: The overruling of the demurrer to pleas 2, 3, 4, and 5 to the first and second counts of the complaint was error without injury, as the plaintiff got the full benefit of the principle claimed, as to the necessity of alleging and proving the requisite intelligence of the child before it could be guilty of contributory negligence, in the charge of the court.

As to the demurrer to the "fifth plea of defendant to second and third counts of the complaint as amended," we do not find any such plea in the record, and at any rate the only fifth plea which is in the record contains a correct statement of the law.

Taking up the exceptions to the action of the court in giving charges at the request of the defendant in the order presented in appellant's brief:

Charge No. 5, requested by defendant, was properly given. If an adult had acted as plaintiff's intestate did, he would certainly have been guilty of contributory negligence, and the charge simply left it to the jury to determine whether or not the said intestate was possessed of sufficient intelligence to be guilty of contributory negligence.

There was no error in giving charge No. 3, requested by defendant. In addition to the fact that plaintiff had taken issue on the plea of contributory negligence to the second count of the complaint, there is no evidence that "said defendant willfully, wantonly, or intentionally, and with a reckless disregard of human life, left said magazine open and unguarded, with a dangerous amount of powder therein and thereabout." The magazine was built of brick and stone, in the woods, not in any

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populous community. The evidence does not show that any great number of people ever passed by it. The road was from 50 to 75 yards away according to estimate, and 150 yards by measurement, while a path which passed within 6 feet of it was seldom traveled. No reason is shown why children should wander there, more than to any other place in the woods. The powder that was in it was caked from having been overflowed by the creek, and, when set on fire this time, merely burned slowly without exploding, and the child's clothes caught fire because he was standing in the door. The same accident would be just as likely to occur in the barn filled with hay under the same conditions. So that the powder in this place was merely combustible, and not a dangerous explosive.

The appellant, in her brief, next claimed that the court erred in giving charge No. 6, requested by defendant; but there is no assignment of error as to charge 6, nor do we find any such charge in the record.

There was no error in giving charge No. 7, requested by defendant. It has been held by this court and others, and is consonant with reason, that, while it is true that "keeping explosive substances in large quantities in the vicinity of dwelling houses or places of business is ordinarily regarded a nuisance," yet the opinion goes on to state, "whether so or not being dependent on the locality, the quantity, and the surrounding circumstances. But negligence or want of ordinary care in the manner of keeping or in keeping large quantities is requisite to impose a liability to answer in damages occasioned by an accidental explosion or fire, which it is incumbent on the party affirming to prove." *Cook v. Anderson*, 85 Ala. 105, 4 South. 713; *Collins v. A. G. S. R. R.*, 104 Ala. 391, 398, 16 South. 140. And again, in a case where this court failed to sustain an action against a street car company, in behalf of a child under the age of 7, because the cars were not sufficiently guarded to prevent a trespassing child from getting on and off the same, the court quotes with approval, from *Elliott on Railroads*, § 1259, "that, although the age of the child may be important in determining the question of contributory negligence, or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers, or bare licensees, not invited or enticed by it, than it is to keep them safe for adults"; and this court goes on to say: "Ordinarily a man who is using his property in a public place is not obliged to employ a special guard to protect it from the intrusion of children, merely because an intruding child may be injured by it." *Jefferson v. Birmingham Ry. Elec. Co.*, 116 Ala. 294, 22 South. 546, 38 L. R. A. 458, 67 Am. St. Rep. 116. See, also, *N. C. & St. L. Ry. v. Harris (Ala.)* 37 South. 794. The storing of large quantities of gunpowder or dynamite in a wooden building, within the corporate limits of a thickly settled town and in proximity to many buildings, constitutes a nuisance; but if the explosives are not kept in such quantities, and at such a

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place, and under such surrounding circumstances, there must be shown some special negligence in the manner of keeping them. *Rudder v. Koopman*, 116 Ala. 332, 22 South. 601, 37 L. R. A. 489. In the strongest case, in favor of the liability of the owner of premises for injury to a child, which has come to our notice, the child was the son of a tenant, who had a right to go over the premises, and the dangerous explosive was a dynamite exploder, which any one might mistake for a harmless article, which was left in the middle of the field, under a shed to which the laborers resorted in case of storm. *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154. In the present case, the magazine being situated and conditioned, as before stated, on private premises, not really containing an explosive, charge No. 7 was certainly not too favorable to the defendant.

The charge mentioned as having been requested by the plaintiff, and refused, does not appear in the bill of exceptions: hence, under the repeated rulings of this court, cannot be considered. For reasons hereinbefore stated, there was no error in the refusal of the court to grant the motion for a new trial.

The judgment of the court is affirmed.

MCCLELLAN, C. J., and HARALSON, TYSON, and ANDERSON, JJ., concur.

FOSTER v. EAST JORDAN LUMBER CO.

(Supreme Court of Michigan, Sept. 19, 1905.)

[104 N. W. Rep. 617.]

Negligence—Contributory Negligence—Question for Jury.—Where, in a personal injury action, the testimony as to plaintiff's conduct was conflicting, the question of contributory negligence was for the jury.

Railroads—Management of Trains—Frightening Horses.*—A railroad company is not liable for the frightening of horses resulting from the ordinary movement of its trains, but is liable on doing anything unnecessary, naturally calculated to frighten ordinarily gentle horses.

Same—Question for Jury.—Whether a railroad company, unnecessarily placing its locomotive near to a traveled street and then allowing steam to escape therefrom, causing a traveler's horse to run away, was guilty of negligence in failing to learn of the approach of the traveler, was for the jury.

Same.*—Whether a railway company, placing its locomotive near a traveled street, was guilty of actionable negligence in unnecessarily allowing steam to escape from the locomotive, thereby frightening the horse of a traveler and causing it to run away, was for the jury.

Evidence—Opinions—Examination of Witness.—Where the court, in an action for personal injuries occasioned by plaintiff's horse being frightened, sustained an objection to a question asked a witness as to

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to frightening teams and saddle horses, see foot-notes appended to *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 14 R. R. R. 806, 37 Am. & Eng. R. Cas., N. S., 806; foot-note appended to *Fares v. Rio Grande Western R. Co.* (Utah), 13 R. R. R. 76, 36 Am. & Eng. R. Cas., N. S., 76.

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what frightened the horse, and stated that it might be well to find out if the witness knew, and the party asking the question failed to lay the proper foundation, the sustaining of the objection was not error.

Appeal—Questions Raised in Supplemental Brief—Consideration.—Questions raised for the first time in the supplemental brief of the party complaining will not be considered on appeal.

Error to Circuit Court, Charlevoix County; Frederick W. Mayne, Judge.

Action by Frank A. Foster against the East Jordan Lumber Company. There was a judgment for plaintiff and defendant brings error. Affirmed.

Argued before MOORE, C. J., and MCALVAY, BLAIR, OSTRANDER, and HOOKER, JJ.

Dennis L. Rogers (Pratt & Davis, of counsel), for appellant.

Alfred B. Nicholas (J. Ernest Converse and E. N. Clink, of counsel), for appellee.

BLAIR, J. The plaintiff, a physician, brought this action against the defendant, a lumbering corporation, to recover damages for personal injuries alleged to have been sustained by plaintiff by reason of the negligence of defendant in so managing a locomotive on its logging railroad as to frighten plaintiff's horse and cause him to run away.

The occurrence took place at defendant's railroad crossing of Mill street in the village of East Jordan, in February, 1901, when the plaintiff, accompanied by two ladies, was driving a single horse attached to a Portland cutter. The crossing is located near the east end of the bridge which spans the south arm of Pine Lake and connects the village of South Arm with the village of East Jordan, and plaintiff approached the crossing along this bridge, the east end of which connects with Mill street, forming a continuous highway and the main thoroughfare between the two villages. The east shore of the lake for upwards of a mile in this locality is used by defendant as a millyard and piling ground for logs and lumber, and as a switchyard for its logging railroad. The lumber in the yard was piled along here in several tiers, running up quite close to the street line at Mill street, so that the plaintiff's view to the south up defendant's track as he approached the crossing was limited to the street lines. At the time of the accident and for about two hours prior thereto, one of the defendant's locomotives, under steam, was standing at a point from 30 to 90 feet south of the crossing, as estimated by different witnesses. The snow was deep, and banked up on either side, leaving a narrow beaten track along the street.

Plaintiff testified that he stopped, looked, and listened when on the bridge some 60 or 80 feet from the crossing, and again on Mill street, from 25 to 30 feet from the crossing, and neither saw or heard anything to indicate the proximity of the locomotive; that when the horse's head was 10 or 12 feet from the track, he suddenly took fright and started to run, and about the

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same time plaintiff heard the sound of escaping steam. "I heard a rumbling sound just as the horse took fright. I have heard a blower on an engine, and this sounded like the sound of a blower." Plaintiff's horse became unmanageable, ran away, and collided with the bunks on a pair of lumber bob sleighs, and plaintiff was severely injured. There was evidence from which the jury might properly find that the horse was roadwise, gentle, and tractable. The jury found a verdict for the plaintiff, and returned answers to two special questions submitted on behalf of defendant, as follows: "(1) Did the plaintiff stop his horse and listen for the sound of a locomotive just before crossing the defendant's railroad track? A. Yes. (2) Could the plaintiff hear the sound of the steam escaping from the cylinder cocks, safety valves, and whistle of the locomotive in question at the time he stopped his horse and listened, just before crossing defendant's railroad track? A. No."

The principal questions of law for our consideration are presented by assignments of error 7 to 13, inclusive, to the effect that the court erred in not directing a verdict for defendant for the reason that the proofs showed that plaintiff was guilty of contributory negligence and defendant was not guilty of any negligence, or, at least, of any negligence which was the proximate cause of the injury. The testimony was conflicting as to the plaintiff's management of his horse and his own conduct; but if the jury believed his testimony and that of the ladies with him and others called by him, as they evidently did from their answers to the special questions, they could properly find him free from contributory negligence, and the court was not in error in submitting the question to them.

The fundamental question in the case is whether, under the evidence, any negligence was shown on the part of the defendant. It is well settled that a railroad company is not liable for the fright of horses resulting from the ordinary use, movement, or situation of its engines, cars, or trains, and that it has a lawful right to make all such noises as are necessarily connected therewith. It may, however, become liable if in such use of its property it does anything unusual or unnecessary, naturally calculated to frighten ordinarily well-broken and gentle horses. 2 Thompson on Negligence, § 1908; Hinchman v. P. M. Ry. Co. (Mich.) 99 N. W. 277; Geveke v. G. R. & I. Ry. Co., 57 Mich. 589, 24 N. W. 675; Dunn v. Railroad Co., 124 N. C. 252, 32 S. E. 711; Petersburg R. Co. v. Hite, 81 Va. 767. In the Hinchman Case the plaintiff attempted to drive across defendant's highway crossing while the tender of its locomotive was something over 10 feet distant from the planking of the crossing, but still on the highway. Just as plaintiff got to the edge of the planking, steam was emitted from the engine, which frightened the horse and plaintiff was injured. Mr. Justice Carpenter, delivering the opinion of the court, said: "The evidence of the plaintiff did not indicate with any certainty just what caused the emission of the steam, and defendant's engineer testified posi-

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tively that he did no act to occasion its emission. It also appeared that there was an automatic safety valve, through which the steam which frightened plaintiff's horse might have been emitted. It is the contention of the defendant that we are bound to assume that such emission of the steam was through the automatic safety valve, and numerous authorities are cited to the proposition that such emission is not negligence. There was testimony from which the jury might have inferred that, though the steam was emitted from the automatic safety valve, its emission could have been prevented by appliances under control of defendant's engineer, and that defendant's engineer could have foreseen this emission and have provided against the consequences by moving his engine farther from the crossing. From this evidence, we think that the jury might infer negligence." In the case at bar there was no automatic valve, but a blower, which must be operated by the engineer or fireman, and it follows, necessarily, from the decision in the Hinchman Case, that the negligence of the defendant would have been properly submitted to the jury, if, as in that case, the enginemen had been aware of his presence.

Is the defendant free from negligence in this case, as a matter of law, because its servants were not aware of plaintiff's approach? In the case of Geveke v. G. R. & I. Ry. Co., supra, it was said that "it was for the jury to say whether, under all the circumstances, it was negligence for the company's agents not to have discovered the plaintiff's team before, and to allow the steam to escape in the manner it did just at the time the plaintiff was making the crossing. We have discovered nothing in the record showing any necessity for opening the cylinder cocks just at that time." So we think it was a question for the jury in the case at bar whether the defendant's employees ought not to have contemplated that a traveler might be near the crossing at the time the fireman put on the blower, and to have refrained from doing so unnecessarily. Defendant had placed its locomotive so near to an important and much-traveled public thoroughfare that the putting on of the blower was likely to frighten any horse that might be near the track, and was bound to know that a horse might come upon the crossing at any time. It had so placed the locomotive that it was entirely concealed from a traveler coming from the west, and had left it there under steam for two hours prior to the accident; and it was open to the jury to find from the evidence that it was not necessary to have placed the engine at this particular point so near the highway, but that it might have been stationed much further away. There was also evidence that the use of the blower was entirely unnecessary. The engineer was absent at the time of the accident, having left the engine in charge of the fireman. He testified: "Q. When the engine is fired up, what is customary to be done with the blower? A. After your steam is up, you have no use for the blower. Q. Was the steam up when you left the engine? A. Yes, sir." As to whether the blower was in use at the time

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of the accident was a question of fact for the jury. Chester Thompson, a witness of the accident, testified that he saw the fireman "turn the blower on a very short time before I saw the doctor," and that he first saw the doctor after the horse began to run away. Plaintiff testified that he had heard a blower on an engine, "and this sounded like a blower." The fireman testified that the blower was not on. If the blower was on at the time of the accident, it must have been put on during the absence of the engineer, and, according to his testimony, unnecessarily. The placing of the engine so near the highway, and leaving it there so long behind the lumber piled by defendant on its own premises, and the unnecessary use of the blower, made it proper for the court to submit the question of defendant's negligence to the jury.

The contention that the alleged negligence of the defendant was not the proximate cause of the injuries is disposed of by the case of *Hinchman v. Railway Co.*, supra.

Defendant's counsel further insist that the court erred in sustaining the objection of plaintiff's counsel to the following question to the witness Nelson Shaw: "Q. What, in your opinion, did that horse of Dr. Foster's get frightened at?" Mr. Shaw saw plaintiff when he was on the bridge, and it was with his lumber sleigh that plaintiff's cutter collided. He stopped his team some 40 or 50 feet east of the crossing to wait for plaintiff to pass him. Upon the propounding of this question the following occurred: "Mr. Clink: We object to that as incompetent and calling for a conclusion. Court: I don't know as a man looking at that distance could testify. (Objection sustained. Exception for defendant.) Court: It might be well to find out, possibly, if he knew. Q. Where did the horse commence to shy towards your sleighs? A. About the time, I think, he came even with my horses' heads. Q. How far were your horses' heads from the railroad track, in your judgment? A. Don't know how far, possibly 40 or 50 feet." In *Geveke v. Railway Co.*, supra, it was held competent for the plaintiff's husband "to give his opinion as to what frightened the team. He was driving them at the time, and his attention was directed to the surroundings, and his observation must have enabled him to form some judgment." In *McCullough v. Railway Co.*, 101 Mich. 234, 59 N. W. 618, the question was again before the court, and Mr. Justice Hooker, delivering the opinion, said: "Defendant complains that the plaintiff's husband was permitted to testify that the horse was frightened by the train, upon the ground that the question was for the jury and that the evidence involved a conclusion. In *Geveke v. Railroad Co.*, 57 Mich. 589, 24 N. W. 675, such evidence was held competent, where the horses were immediately in front of a locomotive when the engineer allowed steam to escape from its cylinders; and in this case, the other evidence clearly shows the cause of the fright of the horse, and the opinion of the witness, if admissible, worked no injury to the defendant." If the testimony of the driver as

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to the cause of the fright is admissible, the testimony of any other witness of the entire transaction must be equally admissible, after showing that his knowledge of the surroundings is sufficient to warrant him in expressing an opinion.

In the case at bar, after overruling the objection, the court said to counsel: "It might be well to find out, possibly, if he knew." We think this was an intimation to counsel that the court would hold the question open for him to test the witness' knowledge, since it did not appear to the court to be shown that the witness could state what the cause was. The substance of the entire testimony of the witness as to the action of the horse, bearing upon the question put to him, was as follows: "I got down there, and noticed a horse coming across the bridge. They came lively as they came on, and I see it was Dr. Foster and two young ladies sitting in the cutter coming, coming along at quite a good gait, and I see we were going to come on the bridge at one time. I sheared off to the right, and thought I would give him his part of the road. His horse, as he went to go by mine, shied, I think, and struck the end of the bunk on the left-hand side of the bunks—on the right side of the sleighs. I think he struck my back bunk with his cutter, and his horse broke loose and yanked him over the dashboard, and he laid there on the ground for a minute. I saw the horse coming over the bridge; do not know as I could tell how fast. It was a good lively gait. Horse had a nice driving appearance—head up and traveling right along. Q. Did he come to a stop before he got to that railroad track? A. Not that time I see him until he hit my sleigh. That 40 or 50 feet was towards Mr. Palmiter's, and horse continued about the same gait until he struck my sleighs; if anything, a little faster from the time I saw him until he hit my sleigh. I was in a position that I could see him plainly, and the horse was trotting all the time until he struck my sleigh. When I first saw the horse on the bridge, he wasn't far from the middle of the draw. The horse wasn't running when he struck my sleigh." It does not appear clearly from this testimony that the horse was frightened at all, certainly not till he went to go by the witness' team; and defendant's counsel, not having seen fit, after the intimation of the court, to supply a proper foundation for the question, the ruling was not erroneous.

There are several points argued in defendant's supplemental brief relative to the declaration and proofs which we do not consider, for the reason that they are raised for the first time in that brief. We have considered the other assignments of error not covered by what has already been said, but do not find the allegations sustained; and the judgment is affirmed.

DOUGHERTY *v.* CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of South Dakota, Sept. 2, 1905.)

[104 N. W. 672.]

Railroads—Crossing Accident—Omission of Signals.*—Evidence, in action for the killing by a train at a railroad crossing of a horse following a team, that the train, a special going 45 miles an hour, gave no crossing signal, as required by Rev. Civ. Code, § 538, and that, hearing no train, and seeing none, because of trees between the highway and track, the person in charge of the team drove on the track, warrants a finding that the accident was caused by the omission or failure to give the signal, making the company liable, in the absence of contributory negligence.

Same—Contributory Negligence.—One hearing no train, because of omission of the crossing signal required by Rev. Civ. Code, § 538, and seeing none, because of woods between the highway and the track in the direction from which a train came, was not guilty of contributory negligence in assuming that no train was near and driving on the track.

Same—Burden of Proof.—Proof of the killing by defendant's train at a railroad crossing of plaintiff's horse is prima facie evidence of defendant's negligence, placing on it the burden of proof that it was not guilty of negligence, and the burden of proof is not shifted to plaintiff by the introduction of evidence by defendant, though it, by overcoming his prima facie case, may require him to give further evidence.

Appeal from Circuit Court, Hutchinson County.

Action by James Dougherty against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Preston & Hannett, for appellant.

W. J. Hooper, for respondent.

CORSON, P. J. This is an appeal by the defendant from a judgment rendered in favor of the plaintiff for damages alleged to have been sustained by him by the loss of a horse killed by an engine of the defendant. It appears from the evidence that the plaintiff resided on the easterly side of the defendant's railway in Hutchinson county, and was the owner of a tract of land on the westerly side thereof; that on the day the horse was killed

*As to whether failure to give crossings signals is negligence per se, see foot-notes appended to McDonald *v.* New York Cent. & H. R. R. Co. (Mass.), 14 R. R. R. 125, 37 Am. & Eng. R. Cas., N. S., 125; Sights *v.* Louisville & N. R. Co. (Ky.), 10 R. R. R. 60, 33 Am. & Eng. R. Cas., N. S., 60; Mercer *v.* Southern Ry. (S. Car.), 8 R. R. R. 703, 31 Am. & Eng. R. Cas., N. S., 703.

For the authorities in this series on subject of the care required of a highway traveler as affected by fact that crossing signals were not given, see foot-note appended to Giardina *v.* St. Louis & M. R. Ry. Co. (Mo.), 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579; foot-note appended to Dunworth *v.* Grand Trunk Western Ry. Co. (C. C. A.), 14 R. R. R. 196, 37 Am. & Eng. R. Cas., N. S., 196; foot-notes appended to Birmingham Ry. L. & P. Co. *v.* Oldham (Ala.), 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165.

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he was used by the plaintiff, with other horses, in farming operations on the land on the west side of the track; that about 6 o'clock in the evening the plaintiff himself took one of his teams and started for Parkston, about one mile away, leading the horse killed, and that his son, a lad of about 14 years, took another team and started for home across the railroad track; that the horse killed broke away from the wagon upon which the plaintiff was riding and followed the team driven by the son across the railroad track; that at the point where the horse was killed is a public highway, and on the west side of the railroad track and for a distance of about 100 feet westerly therefrom was a thick clump of trees and bushes, which prevented one, while passing along the highway for that 100 feet, from seeing any train that might be coming from the south along the railroad; that about the hour mentioned a special freight train came along from the south, making about 45 miles an hour, but this train was not noticed by the boy until he was upon the railroad track, when, seeing the approaching train, he hastened to cross to the east side, which he succeeded in reaching, but the horse following him was struck by the engine and killed.

The case was tried to a jury, which found a general verdict in favor of the plaintiff, and also special verdicts submitted to them as follows: "(1) Within what distance could the engineer, by proper use of the appliances at his command, have stopped this train at the time and place shown by the evidence? (No answer.) (2) Was the horse killed through the negligence of the defendant? Yes; for not whistling at the proper place nor ringing the bell. (3) If you answer 'Yes' to question 2, state in what does the negligence consist? For not blowing the whistle in time, nor ringing the bell. (4) If you find any acts of negligence, was the injury caused by such acts of negligence? By not whistling, nor ringing the bell. (5) What could the engineer have done that he did not do, after he had knowledge that the horse was approaching the track, that would have prevented the injury? Tried to stop, which he failed to do." It will be noticed that by the special verdict the jury found that the defendant's engineer failed to ring the bell or blow the whistle before reaching the highway. It was shown by the defendant in defense of the action that its train was properly equipped and run by competent trainmen, and it was not claimed on the part of the plaintiff that any negligence was shown on the part of the defendant, other than its failure, as found by the jury, to ring the bell or blow the whistle, as provided by section 538, Rev. Civ. Code, which reads as follows: "A bell at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning

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the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect."

The appellant seeks reversal upon two grounds: (1) That the evidence given upon the trial discloses that the accident was unavoidable; (2) That the evidence upon the trial established the fact that the plaintiff directly contributed to the injury by permitting the horse to run loose and get upon the track of its own free will, and that plaintiff's son was guilty of contributory negligence in crossing the track without observing the approaching train. A motion was made at the close of all the evidence for the direction of a verdict in favor of the defendant upon the grounds above stated, which was denied. The defendant in its answer did not plead contributory negligence; but it contends that the evidence on the part of the plaintiff proves conclusively such contributory negligence, and therefore the plaintiff was not entitled to a verdict, notwithstanding the omission to plead contributory negligence of the plaintiff. Defendant also contends that, as the horse was not seen by the engineer or trainmen on defendant's train in time to enable them to stop the train or prevent the accident, the accident must be regarded as unavoidable, and the plaintiff was not, for that reason, entitled to recovery.

We are of the opinion that neither of these contentions are tenable, and that the defendant, having failed to comply with the provisions of the statute by ringing the bell or sounding the whistle continuously for 80 rods before it passed the crossing, and the jury having found that such failure was the cause of the injury, was guilty of such negligence as entitled the plaintiff to recover. The train was a special train, and, as will be noticed, was proceeding at a high rate of speed, and that, intervening between the train as it came to the crossing and the highway, there was an obstruction by reason of the timber and underbrush, preventing the boy from seeing the train until he was upon the track, and we are of the opinion that the jury were fully justified in finding that the accident was caused by the failure of the engineer to comply with the provisions of the statute, as it is reasonable to presume that, had the whistle been sounded or the bell rung, as required by the statute, the attention of the boy would have been drawn to the train, and he would have avoided crossing the track until the train had passed along. At common law, independently of the statute, it was the duty of railroad companies in approaching public crossings to exercise reasonable care and diligence to prevent injuries to travelers or property properly passing along the highway. *Louisville R. R. Co. v. Commonwealth*, 13 Bush. 388, 26 Am. Rep. 205. But in this state these duties are imposed upon the railroad companies by statute, and the failure to observe the provisions of the statute constitutes such negligence as will render the railroad liable when the failure to comply with the provisions of the statute is the cause of the injury. In the absence, therefore, of a finding

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by the jury that the party injured was guilty of contributory negligence, the facts that the injury occurred at a public crossing, and that no warning had been given of the approaching train by the ringing of the bell or sounding of the whistle, render the company clearly liable for any injury caused by such failure. It will be observed in the case at bar that the jury finds that the horse was killed as a result of the failure of the defendant to comply with the provisions of the statute, and this finding is clearly sustained by the evidence. In this respect, therefore, the case at bar differs from the case of *Mankey v. C., M. & St. P. R. R. Co.*, 14 S. D. 468, 85 N. W. 1013, in which it was held that where a horse was injured by being run into by a train between a whistling post and a crossing, and no statutory signals were given, there could be no recovery for the injury, in the absence of evidence that such failure was the cause of the injury. The court was clearly right, therefore, in denying defendant's motion to direct a verdict in its favor.

The contention of the defendant that the record discloses that the plaintiff's boy was guilty of contributory negligence is clearly untenable. The traveler on a public highway is bound only to the exercise of ordinary care and prudence, and when he approaches a railway track, and can neither hear nor see an approaching train, he is not chargeable with negligence for assuming that there is no train sufficiently near to make the crossing dangerous, when the signals required by law are not given. *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761. In that case it was held: "The omission of a railroad company to give the signals required by the statute, on the approach of a locomotive within 80 rods of a highway crossing, is a breach of duty to the passengers, whose safety it imperils, and to the wayfarer, whom it exposes to mutilation and death. The omission of the customary signals is an assurance by the company to the traveler that no engine is approaching from either side within 80 rods of the crossing, and he may rely on such assurance, without incurring the imputation of breach of duty to a wrongdoer. The citizen on the public highway is bound only to the exercise of ordinary care, and, when he is injured by the negligence of a railroad company, it is no answer to his claim for redress that, notwithstanding the omission of the signals, he might by greater vigilance have discovered the approach of the train, if he had foreseen a violation of the statute, instead of relying upon its observance." A person may assume that a train approaching within 80 rods of the crossing will give the statutory signal, and, in the absence of such signal, such person cannot be regarded as guilty of contributory negligence by attempting to cross the track after looking and listening for an approaching train, where no statutory signal has been given. *Newson v. N. Y. Cent. R. Co.*, 29 N. Y. 390; *Johnson v. Hudson River Ry. Co.*, 20 N. Y. 74, 75 Am. Dec. 375; *Harpell v. Curtis*, 1 E. D. Smith 78; *Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 383; *Gordon*

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v. Grand St. Ry. Co., 40 Barb. 550; *Penn. Ry. Co. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322.

It is further contended by defendant that the court erred in its charge to the jury as follows: "And that proof is sufficient to place the burden of disproving negligence upon the defendant. The defendant, upon such proof being exhibited to you, must show you that in and about the accident in question the company was not negligent." The objection to the charge made by the counsel for the defendant is that the court failed to instruct the jury that, upon proof by the defendant that its train was properly equipped with all modern appliances and manned by an efficient crew of trainmen and that the animal was not seen by the engineer in time to stop the train or prevent the accident, the burden of proof then shifted to the plaintiff to prove actual negligence on the part of the defendant, and made out for the plaintiff a prima facie case entitling him to recover, and that the burden of proof was then upon the defendant to show that it was not guilty of negligence. In this view the court was clearly correct. The proof of the killing established prima facie negligence on the part of the defendant, and the plaintiff's right to recover. The law then placed the burden of proof upon the defendant to establish that it was not guilty of negligence, and this evidence was subject to rebuttal by evidence on the part of the plaintiff; but the burden of proof was not shifted to plaintiff. It still remained with the defendant, and, unless the defendant established by a preponderance of evidence that it was not guilty of negligence, the plaintiff would be entitled to a verdict on his prima facie case. It is true that, if the defendant introduces evidence tending to show that it was not guilty of negligence, or that the accident was caused by the contributory negligence of the plaintiff, the prima facie case of the plaintiff might be overcome, and the plaintiff required to give evidence, in addition to the presumption, tending to prove that the defendant was guilty of negligence which caused the accident; but, as before stated, unless the defendant's evidence preponderated over that introduced by the plaintiff, the plaintiff would still be entitled to recover upon its prima facie case made by proof of the killing. The court's instructions were clearly right.

Finding no error in the record, the judgment of the court below and order denying a new trial are affirmed.

COLOMB *v.* PORTLAND & B. ST. RY.

(Supreme Judicial Court of Maine, Oct. 3, 1905.)

[61 Atl. Rep. 898.]

Street Railways—Personal Injuries—Child Injured on Track—Contributory Negligence—Due Care.*—In a case where a child 10 years and 7 months old, while attempting to cross an electric railway track in a street, was run over by a car, and where it appears that the car, at the time she attempted to cross, was in plain sight of her and could not have been much more than its own length from her, and where it is manifest either that she did not look to see if the car was approaching or that, if she looked, she must have seen the car, held, that her contributory negligence is a bar to her recovery against the railway company. Her act can hardly be regarded otherwise than a result of a sudden, unthinking impulse, or of a reckless daring.

Same—Care Required of Infant.†—Though children are not by law holden to the exercise of the same extent of care that adults are, and though the age and intelligence of a party are important factors in determining whether due care has been used, yet the plaintiff in this case was bound to use that degree or extent of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances.

Held, that the plaintiff clearly failed to use that care which a child of her intelligence should use.

(Official.)

Action on the case, brought to recover damages for personal injuries sustained by Alberta Colomb by reason of being run over by one of the cars of the Portland & Brunswick Street Railway in Brunswick village. At the time of the injury the plaintiff was of the age of 10 years and 7 months. As one of the results of the injuries sustained by the plaintiff, she lost an arm. Verdict for plaintiff for \$2,800. Defendant then filed a general motion to have this verdict set aside. Sustained.

*For the illustrations in this series of the question whether or not a child was guilty of contributory negligence, see foot-note appended to *Cameron v. Duluth-Superior Traction Co.* (Minn.), 14 R. R. R. 632, 37 Am. & Eng. R. Cas., N. S., 632.

†For the authorities in this series on the question whether there can be a recovery for injuries sustained in an attempt to cross a railroad track in front of an approaching train or car which is seen by the party to be approaching before he makes such attempt, see foot-note appended to *Roefeldt v. St. Louis & S. Ry. Co.* (Mo.), 13 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470; *Lambert v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575; *Hornstein v. Rhode Island Co.* (R. I.), 14 R. R. R. 401, 37 Am. & Eng. R. Cas., N. S., 401.

For the authorities in this series on the question of the degree of care required of children for their own safety, see foot-note appended to *Christensen v. Oregon Short Line R. Co.* (Utah), 16 R. R. R. 121, 39 Am. & Eng. R. Cas., N. S., 121; foot-notes appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154; foot-note appended to *Indianapolis St. Ry. Co. v. Schomberg* (Ind.), 14 R. R. R. 627, 37 Am. & Eng. R. Cas., N. S., 627; foot-notes appended to *Atlanta & W. P. R. Co. v. West* (Ga.), 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548.

Colomb v. Portland & B. St. Ry

Argued before STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

McGillicuddy & Morey and *William H. Looney*, for plaintiff.
Weston Thompson, for defendant.

SAVAGE, J. The plaintiff, then a child of 10 years and 7 months, was run over by one of the cars of the defendant in Brunswick village, and received injuries for which she seeks to recover in this action. The accident occurred nearly in front of the place where the plaintiff was attending school, before school hours. At the time many of the school children were playing in the street upon both sides of the defendant's track, and perhaps upon the track. The car was proceeding on a slight downgrade. The only witness who claimed that he made any particular observation testified that at the point of collision the track was visible back for a distance of 1,500 or 1,600 feet. The car was eight-wheeled and 40 feet long. The car was stopped by reversing the motor while going a little more than half its length, after the plaintiff came onto the track.

The plaintiff claims that the defendant was negligent, because the car was being driven at an unreasonable and dangerous rate of speed, because no warning by bell, gong, or whistle was given while the car was approaching the place of the accident, and because the motorman allowed his attention to be diverted to a boy standing by the side of the street, instead of looking straight ahead. This same witness estimated the speed of the car at 16 or 17 miles an hour. The weight of the evidence, and upon some of the propositions the great weight of evidence, we think negatives these claims.

But, if we assume that there was sufficient evidence of the defendant's negligence to go to the jury on that ground, there is another ground which we think presents an insuperable obstacle to the plaintiff's recovery. The plaintiff was bound to show, not only the defendant's negligence, but affirmatively that no want of due care on her part contributed to her injury. *McLane v. Perkins*, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487. Here we think she fails. She attempted to cross the track in front of a moving car, which could not have been many feet from her. For, taking any fair estimate of her own speed and the outside estimated speed of the car, she would have crossed the track in not much more time than it took the car to run its own length. Though a child, she was nevertheless bound to exercise due care. Though children are not by law holden to the exercise of the same extent of care that adults are, though the age and intelligence of a party are important factors in determining whether due care has been used, yet the plaintiff was bound to exercise that degree or extent of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances. *Gleason v. Smith*, 180 Mass. 6, 61 N. E. 220, 55 L. R. A. 622, 91 Am. St. Rep. 261 (the case of a child 12 years old). If children unreasonably, intelligently, and intentionally run into danger,

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they should take the risks. *Collins v. South Boston R. R.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675.

Due care required the plaintiff to use some degree of watchfulness before she attempted to cross. That she appreciated the danger of crossing an electric railroad track, and the need of watching, is evident; for she says that she always looked before crossing, so that she should not be struck by a car, and that in this instance she looked on both sides to see if a car was coming. But she says she was not careless in attempting to cross, because she not only looked, but, when she looked, there was no car in sight; and in this she is supported by one witness, who says that he crossed the same track at about the same place, only a few feet in front of her, and that he looked and saw no car. The plaintiff and her witness are undoubtedly mistaken, to say nothing worse. It is clear beyond contradiction that the car was in plain sight at the time they say they looked. They could not have looked as they say they did without seeing the car. The plaintiff either looked and saw the approaching car, or she did not look. In either event she was careless. *Blumenthal v. Boston & Maine R. R.*, 97 Me. 255, 54 Atl. 747. Her act can hardly be regarded otherwise than the result of a sudden, unthinking impulse or of reckless daring. To attempt to cross the track in front of a moving car, which could not have been many feet from her, was conduct "such as the judgment of common men universally would condemn as careless in any child of sufficient age and intelligence to be permitted to go alone" across a street on which electric cars are frequently passing. *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282. See, also, *Casey v. Malden*, 163 Mass. 507, 40 N. E. 849, 47 Am. St. Rep. 473; *Mullen v. Springfield St. Ry. Co.*, 164 Mass. 450, 41 N. E. 664.

Motion for a new trial sustained.

JACKSONVILLE ELECTRIC CO. v. ADAMS.

(Supreme Court of Florida, Division B., July 26, 1905.)

[39 So. Rep. 183.]

Imputed Negligence—Injury to Child.*—The contributory negligence of parents in permitting a child, a boy four years and one month old, to go without a caretaker upon the streets of a city upon which electric cars are operated, cannot be imputed to the child in an action by him against the corporation operating the electric cars for damages resulting to him from the negligent operation of an electric car.

Trial—Instruction.—An instruction calculated to mislead the jury is properly refused.

*See foot-notes appended to *Richmond, F. & P. R. Co. v. Martin* (Va.), 13 R. R. R. 435, 36 Am. & Eng. R. Cas., N. S., 435.

For the other authorities in this series on the subject of imputed negligence, see foot-note appended to *St. Louis & S. F. R. Co. v. McFall* (Ark.), 16 R. R. R. 243, 39 Am. & Eng. R. Cas., N. S., 243; *Chicago Union Traction Co. v. Leach* (Ill.), 16 R. R. R. 220, 39 Am.

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Street Railroads—Injury to Child—Negligence.†—Where the motor-man of an electric car, being operated upon the streets of a city, should and must have seen a child of tender years, unattended, in dangerous proximity to the track upon which the car was being operated, it was his duty to use means "strictly commensurate with the demands and exigencies of the occasion" to prevent injuring such child, the burden of proof being upon the electric car company to show that such means were used; and under such circumstances, if such proof is not satisfactorily made, the company is negligent and liable for damages.

Trial—Instructions.—If there are several important issues in a case, it is not proper to single out one of them in an instruction, in such a way as might impress the jury that such issue was the controlling one, and thus mislead the jury; and such an instruction is properly refused.

Appeal—Review—New Trial.—Where the bill of exceptions does not show any exception to the ruling of the trial judge denying a motion for a new trial, this court cannot consider the merits of such motion.

(Syllabus by the Court.)

Error to Circuit Court, Duval County: Rhydon M. Call, Judge.

Action by Stanley Adams, by Wright Alexander Adams, his next friend, against the Jacksonville Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On the 21st of April, 1903, the defendant in error, Stanley Adams, hereinafter called the plaintiff, by W. A. Adams, his next friend, filed his declaration against the plaintiff in error, hereinafter called the defendant, containing six counts. The first count is as follows:

"Stanley Adams, by Wright Alexander Adams, his next friend, plaintiff, by Bryan & Bryan, his attorneys, in this first count of his declaration sues Jacksonville Electric Company, a corporation organized and doing business under the laws of the state of Florida, defendant. for that heretofore, on, to wit, March

& Eng. R. Cas., N. S., 220; foot-note appended to McKennan v. Detroit Citizens' St. Ry. Co. (Mich.), 15 R. R. R. 400, 38 Am. & Eng. R. Cas., N. S., 400; Hampel v. Detroit, etc., R. Co. (Mich.), 14 R. R. R. 732, 37 Am. & Eng. R. Cas., N. S., 732.

†For the authorities in this series on the subject of the care required of those in charge of street cars to avoid collision with other users of streets, see foot-note appended to Laronde v. Boston & M. R. R. (N. H.), 16 R. R. R. 223, 39 Am. & Eng. R. Cas., N. S., 223; McVean v. Detroit United Ry. (Mich.), 15 R. R. R. 464, 38 Am. & Eng. R. Cas., N. S., 464; Metropolitan St. Ry. Co. v. Gilbert (Kan.), 15 R. R. R. 428, 38 Am. & Eng. R. Cas., N. S., 428; Birmingham Ry. Light & Power Co. v. Brantley (Ala.), 15 R. R. R. 191, 38 Am. & Eng. R. Cas., N. S., 191; Butler v. Rockland, etc., St. Ry. (Me.), 14 R. R. R. 778, 37 Am. & Eng. R. Cas., N. S., 778; foot-note appended to Kennedy v. Consolidated Traction Co. (Pa.), 14 R. R. R. 635, 37 Am. & Eng. R. Cas., N. S., 635; foot-notes appended to Greene v. Louisville Ry. Co. (Ky.), 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; foot-notes appended to Richmond P. & P. Co. v. Allen (Va.), 14 R. R. R. 566, 37 Am. & Eng. R. Cas., N. S., 566; Indianapolis St. Ry. Co. v. Taylor (Ind.), 14 R. R. R. 356, 37 Am. & Eng. R. Cas., N. S., 356.

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26th, 1903, the said defendant was the owner and operator of a certain street car propelled by the power of electricity, numbered 88; that defendant, through its agents and servants, has the exclusive control and management of said street car and was operating same in the city of Jacksonville, Duval county, Florida, upon certain street railroad track of defendant, located upon Bridge street and Monroe street and divers other streets in said city of Jacksonville; that plaintiff was, on the day aforesaid, to wit, March 26th, 1903, of the age of four years and one month; that on said day, to wit, March 26th, 1903, in the light of day, at, to wit, 8 o'clock in the forenoon thereof, while plaintiff was lawfully on said Monroe street, at or near the intersection of said Monroe street with said Bridge street, the defendant, by and through its servants and agents, then and there carelessly and negligently propelled its said street car northward on said Bridge street, and westward into and upon said Monroe street, and then and there, by means of said street car so carelessly and negligently operated by the said defendant, did wrongfully, carelessly, violently, and negligently knock down and run upon the plaintiff; that the said street car passed over and upon the plaintiff, and one of the wheels of said street car cut, mashed, bruised, and crushed plaintiff's left foot to such an extent that it became and was necessary to amputate plaintiff's left leg between the foot and the knee; that plaintiff was thereby maimed for life, and greatly wounded, bruised, and hurt, and became sick, sore, and lame and disordered, and so remained for a long space of time, to wit, from thence hitherto, during all of which plaintiff has suffered great mental and bodily pain.

"Wherefore the plaintiff says he has sustained damages to the amount of twenty-five thousand dollars (\$25,000.00), and therefore brings this, his suit."

The second count is similar to the first, with the additional allegation that the plaintiff was "in the exercise of due and reasonable care and caution" when he was injured.

The third count is similar to the first, with the additional allegation that the defendant propelled its street car northward on Bridge street, and westward into and upon Monroe street, "carelessly and negligently, and without giving proper signal or signals, and without giving proper warning or warnings."

The fourth count is like the first, with the additional allegation that the car was being run "at great and unlawful speed" when the plaintiff was injured.

The fifth count is like the first, except that it contains allegations to the effect that Bridge street extends north and south, and Monroe street east and west, and that they intersect, and that at and near the intersection they are much frequented, and that said place of intersection was naturally attractive and interesting to a child of tender years, and such a child was likely to expose himself to injury upon the street car track at said intersection, and that the defendant's officers and agents well knew these facts.

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The sixth count avers each and every allegation of the preceding five counts.

The defendant demurred to the declaration, stating in substance the following points of law to be argued:

(1) That the declaration does not state a valid cause of action and is insufficient in law.

(2) The declaration fails to allege that both the child and parents were free from fault.

(3) The declaration fails to show gross negligence upon the part of the defendant.

(4) The child being permitted to go at large, the negligence of the parent is imputed to the child.

This demurrer was overruled, and the defendant pleaded, first, not guilty; and, second, that the injuries and damages complained of were caused solely by the negligence and carelessness of the parents of Stanley Adams in permitting him to go at large and in the public streets, their home fronting the track of defendant, without any caretaker, and said Stanley Adams being a child of tender age, to wit, four years and one month, and that said negligence and carelessness became and was the negligence and carelessness of the said Stanley Adams.

The above second plea was demurred to, and the demurrer sustained by the circuit judge. No other plea was filed, and the case was tried on the plea of not guilty. The jury rendered a verdict for the plaintiff for \$7,000, a judgment rendered thereon, and the case is here on writ of error from said judgment. Such other facts as it may be necessary to state will be given in the opinion.

J. E. Hartridge, for plaintiff in error.

Bryan & Bryan, for defendant in error.

HOCKER, J. (after stating the facts). The first three assignments of error involve the same question presented in different modes, viz., whether the supposed negligence of the parents of Stanley Adams, an infant four years and one month old, in permitting him to go upon the street in the city of Jacksonville without a caretaker, can be imputed to the said infant, so as to defeat a recovery by him in this action. We say "supposed negligence," for it does not clearly appear under what circumstances Stanley Adams happened to be on the street at the early hour of the morning when he was injured. We will treat the case upon the theory that his parents were passively negligent in permitting him to be there. The decisions of the courts upon this question are not uniform. It was held in England in the case of *Lynch v. Nurden*, 5 Jurist, 797, that the rule of law, under which a plaintiff who has contributed to an injury occasioned by the negligence of the defendant cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. Where, therefore, the defendant's servant left a horse and cart unattended in a public street, and

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the plaintiff, a child under seven years of age, climbed on the wheel, and other children urged forward the horse, whereby the plaintiff was thrown to the ground and the wheel fractured his leg, it was held that "on these facts the jury were justified in finding a verdict for the plaintiff, if they were of opinion that there was negligence on the part of the servant." Nothing is said by Lord Denman, C. J., who rendered the opinion, about the negligence of the parent in permitting the child to be upon the streets unattended. In the case of *Waite v. North Eastern Railway Co.*, *Ellis, Blackburn & Ellis* (96 E. C. L.) 728, the facts were that a grandmother, who had charge of a child too young to take care of itself, bought two tickets at a railway station for the purpose of the two being conveyed on the railway. While the grandmother and child were on the railway, after the tickets had been bought, the child was injured by an accident caused by the joint negligence of the grandmother and the company's servants. It was held that the child could not recover. *Cockburn, C. J.*, said: "I put the case on this ground: That when a child of such tender and imbecile age is brought to a railway station, or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. * * * Here the child was under the charge of his grandmother, and the company must be taken to have received the child as under her control and subject to her management." In these views the other judges agreed.

In the case of *Lygo v. Newbold, Welsby, Hurstone & Gordon* (9 Exch.) 302, *Pollock, C. B.*, says: "The case last put raises a doubt as to the authority of *Lynch v. Nurdin*, if it be applicable to the case where a child receives an injury from indulging in what is called the natural instincts of a child by getting up behind a gentleman's carriage, there being no servant there." And it is said by *Hoar, J.*, in *Wright v. Malden & Melrose Railroad Company*, 4 Allen (Mass.) 283, that, though questioned in *Lygo v. Newbold*, the case of *Lynch v. Nurdin* has generally been followed as an authority. For a discussion of the state of the English law on this question, see *Beach on Contributory Negligence*, §§ 137-139. In the United States the courts are divided. What is known as the New York rule, laid down in *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, established the doctrine that the negligence of the parent, contributing to the injury of an infant of tender years, is imputed to the infant and prevents a recovery of damages on behalf of the infant. Massachusetts and some other states have followed this rule. In the case of *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, the New York rule is repudiated, and what is known as the Vermont rule was established. A large majority of the states which have made deliverances upon this question have followed the Vermont rule. See *Ray's Negligence of Imposed Duties*, §§ 194, 195, et seq.; *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 27 N. E.

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899, 21 L. R. A. 76, note. In Bishop on Noncontract Law, §§ 578-591, the author discusses these rules at some length. In section 582 he says: "This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor, or shiftless, or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But by the new doctrine, after a child has suffered damages which confessedly are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any one of several defendants who may have contributed to them, he cannot have them if his father, grandmother, or mother's maid happens to be the one making a contribution. In these and other respects it is submitted the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contemplation does not belong to the common law." Mr. Bishop concludes: "It is the better doctrine that the parent's contributory negligence does not cut off the child's claim for an injury, nor does the child's the parent's." Section 591, *Id.*; Beach on Contributory Negligence, §§ 140, 141; Newman v. Phillipsburg Horse Car R. Co., 52 N. J. Law, 446, 19 Atl. 1102, 8 L. R. A. 842, and notes; Government St. R. R. Co. v. Hanlon, 53 Ala. 70; Huff v. Ames, 16 Neb. 139, 19 N. W. 623, 49 Am. Rep. 716. It seems to be undisputed that, where the parent sues for loss of services sustained by an injury to the child, then the contributory negligence of the parent may be a bar. Bishop on Noncontract Law, § 577. It would be prolix to go into a minute examination of the great number of cases bearing on this question. An examination of the authorities cited will discover them. We think it enough to say that in our opinion the weight of reason and authority is with the Vermont rule, and that in an action by the child for damages for an injury the negligence of the parent cannot be imputed to the child, so as to prevent a recovery.

The fourth assignment of error is based on the refusal of the trial judge to give the following instruction to the jury at the request of the defendant, viz.: "A child, to the extent that he has knowledge and understanding of the danger, or where the danger is of such a nature as to be obvious even to one of his years, is under a duty under the law to avoid the danger, and, if on the track, to get off and out of the way of the danger, or if near the track, and the car is in plain sight, not to go upon the track in front of the car; and if you believe from the evidence in this case that Stanley Adams had knowledge and understanding of the danger, or the danger was of such a nature as to be obvious to one of his years, and the car was in plain sight, and he was on the track, and did not get off, and had time to get off, or was near the track, and ran upon the same in front of the car,

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and so near the car as to make it impossible for the car to be stopped before reaching him, your verdict should be for the defendant." The bill of exceptions states that this charge was based upon the following state of facts: "That Stanley Adams was a child four years and one month of age at the time of his injuries, and of more than average brightness and intelligence, as appeared by the exhibition to the jury, and while on or near the track of the defendant was in a position to see the car approaching, and that from his position at the time of the accident the car would have been in plain sight, and was near the track, and suddenly ran near the car, or so near as to make it impossible to stop the car before reaching him." This instruction, it seems to us, was calculated to mislead and embarrass the jury, considered as containing several independent conditions and propositions separated by the disjunctive "or," the existence of any one of which would have required a verdict for the defendant, when only one of them is covered by the predicated statement of facts. Again, we do not think that the predicated statement of facts warranted the exclusion from the consideration of the jury, under the law of this state, of all consideration of contributory negligence on the part of the defendant. Granting that this child of four years and one month of age was more than ordinarily intelligent, that he was on or near the track, that the car was in plain sight, that it was his duty to avoid danger, and not to go in front of the car or dangerously near it, still the measure of his duty should be the discretion of one of his years. Bishop on Noncontract Law, § 590. It is not stated that he actually saw the car, or that the agents of the company took any precaution to attract his attention, or any measure to prevent his injury, though they must have seen him.

In the case of Florida Cent. & P. R. Co. v. Williams, 37 Fla. 406, 20 South. 558, this court holds that "where steam railroads are laid and operated along or across the streets of populous towns or communities, where numerous people of all conditions and descriptions are aggregated or likely to be, it is their duty to operate the dangerous implements used by them with the utmost degree of care, strictly commensurate with the circumstances by which they are there surrounded, in order to avoid injury to others. But, while it is thus the duty of such companies to guard against injury to others with the utmost care, caution, and vigilance, there is at the same time a mutual obligation resting upon the public; and each and every of them, in the presence of such dangerous surroundings, to exercise such a degree of care, caution, and vigilance for their own safety as is commensurate with the known dangers there present." This case occurred previous to the enactment of section 1, c. 4071, p. 113, Laws 1891, which is as follows: "A railroad company shall be liable for any damage done to persons, stock or other property by the running of the locomotives or cars or other machinery of such company, or for damages done by any person in the employment and service of such company, unless the com-

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pany shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the company." In the case of Consumers' Electric Light & St. R. Co. v. Pryor, 44 Fla. 354, 32 South. 797, it was held that this act (chapter 4071) was applicable to electric street railways, and that, while it does not arbitrarily fix liability for an injury done, it does raise a presumption of negligence as arising from the injury done. In the case of Morris v. Florida Cent. & P. R. Co., 43 Fla. 10, 29 South. 541, this court had occasion to construe this section. It is held that under its provisions what will constitute the amount or kind of diligence that will be required as "ordinary and reasonable" must necessarily vary under different circumstances. It cannot be measured or ascertained by any fixed or inflexible standard, because the words just quoted are themselves relative terms, and what under some circumstances would be ordinary and reasonable diligence might under other conditions amount to even gross negligence. It is further said that the care and diligence to be used in cases embraced in the statute should be "strictly commensurate with the demands and exigencies of the occasion and with the relationship that the company bears at the time to the party in question." We think that the motorman should and must have seen the plaintiff on or dangerously near the track; that it was his duty to see him, and, seeing that he was of tender years, it was his duty to use means "strictly commensurate with the demands and exigencies of the occasion" to prevent injuring him. The presumption is against the defendant, and neither the charge nor the facts predicated meet and overcome this presumption. Bottoms v. Seaboard & Roanoke R. Co., 114 N. C. 699, 19 S. E. 730, 41 Am. St. Rep. 799, 25 L. R. A. 784, and notes; Clark's Accident Law (Street Railways) 105; Consumers' Electric Light & St. R. Co. v. Pryor, supra; Nellis on Street Surface Railroads, pp. 298, 374, et seq. More care must be used towards children than towards adults, and if in the exercise of due care the motorman should have seen the child, and did not, then he was negligent. Clark's Accident Law, § 104. We do not think the court erred in refusing to give this charge.

The fifth assignment of error is based on the refusal of the judge to give the following charge, viz.: "Under the law, away from the street crossing, street cars have the right of way on their tracks in the streets over pedestrians and vehicles." This requested instruction was predicated upon the fact that Stanley Adams was not on a street crossing, but 80 or 90 feet therefrom when injured. As an abstract question, this may be a correct statement of the law; but what particular application of it the jury were expected to make we are not advised. It was calculated to impress the jury that the company had a superior right upon its track, which afforded a complete defense to the defendant, irrespective of its actual or presumptive negligence, or its duties to the plaintiff. If there are several important issues, it is not proper to single out one of them as the controlling issue (11

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Ency. Pl. & Pr. 185), and in this case it is evident that the issue presented in this instruction was not the only or controlling one.

The remaining assignments of error are based on the overruling of a motion for a new trial. These cannot be considered by this court, inasmuch as the bill of exceptions does not show any exception to the ruling of the court thereon. *McDonald v. State* (Fla.) 35 South. 72; *Parnell v. State* (Fla.) 36 South. 165, and cases cited; *Dupuis v. Thompson*, 16 Fla. 69, text 73.

The judgment of the circuit court is affirmed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

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(Supreme Court of Pennsylvania, June 22, 1905.)

[61 Atl. Rep. 903.]

Railroads—Accident at Crossing—Negligence.—That a passenger train is running 25 minutes behind schedule time does not show negligence on the part of the railroad company.

Same.*—To run a fast passenger train in the nighttime over a country crossing at the rate of 35 miles an hour is not negligence.

Same—Evidence of Speed.†—Where the speed of a passenger train, as shown by a train record made by the conductor at the time, was 35 miles an hour, testimony of a witness that the train was running very fast, but not fixing any standard by which the speed could be estimated is immaterial.

Same—Signals at Crossing.‡—Where 14 witnesses testified that the whistle was blown and the bell rung on a stormy night on approaching a railroad crossing, and 9 witnesses testified that they did not hear either, the fact that these duties were performed was conclusively established.

Appeal from Court of Common Pleas, Luzerne County.

Action by Mattie E. Keiser against the Lehigh Valley Rail-

*For the authorities in this series on the question whether any rate of speed at country crossings may constitute negligence in running a train, see foot-note appended to *Vizacchero v. Rhode Island Co.* (R. I.), 14 R. R. R. 172, 37 Am. & Eng. R. Cas., N. S., 172.

†For the authorities in this series on the question of the admissibility of the opinions of non-experts as to the speed of a train or street car, see foot-note appended to *Gregory v. Wabash R. Co.* (Iowa), 15 R. R. R. 457, 38 Am. & Eng. R. Cas., N. S., 457; foot-note appended to *Norfolk & W. Ry. Co. v. Briggs* (Va.), 13 R. R. R. 201, 36 Am. & Eng. R. Cas., N. S., 201.

‡For the authorities in this series on the question of the comparative weight of affirmative and negative testimony as to whether or not crossings signals were given, see foot-notes appended to *Indiana, I. & I. R. Co. v. Otstot* (Ill.), 14 R. R. R. 149, 37 Am. & Eng. R. Cas., N. S., 149; foot-notes appended to *McDonald v. New York Cent. & H. R. R. Co.* (Mass.), 14 R. R. R. 125, 37 Am. & Eng. R. Cas., N. S., 125; foot-note appended to *Chicago & A. Ry. Co. v. Pulliam* (Ill.), 13 R. R. R. 755, 36 Am. & Eng. R. Cas., N. S., 755.

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road Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Paul J. Sherwood, for appellant.

J. B. Woodward, for appellee.

ELKIN, J. The plaintiff in her statement of claim charged the defendant company with negligence in running the train, which caused the accident, at an unusual time and excessive rate of speed, and without giving due warning of its approach to the crossing. The appellee cannot be held liable in damages unless it affirmatively appears from the evidence that there was negligence in some or all of these respects. What does the evidence disclose? The train was running after midnight about 25 minutes behind its schedule time. This is neither unusual nor exceptional, and is not negligence within the meaning of the law, so as to make the defendant liable in damages. Nor does the testimony show that the train was running at an excessive rate of speed. The witnesses of the appellant did not fix the rate of speed. It is true one witness testified that the train was running very fast; but inasmuch as he did not say how fast, nor fix any standard by which the speed of the train could be ascertained, his testimony is without value in this respect. The exact rate of speed, shown by the schedule and fixed by the train record made by the conductor at the time, showed the rate of speed to be a little over 35 miles an hour. It was a fast passenger train with two locomotives, and this rate of speed is not excessive for such a train. It is clear, therefore, that the appellant failed to establish her allegations of negligence that the train was running at an unusual time or at an excessive rate of speed.

The only question left for us to consider in reference to the alleged negligence of the defendant is whether through its employees it failed to give due warning of the approach of the train to the crossing. The appellee contends that it performed its duty in this respect by providing headlights for its engines and by ringing the bell and blowing the whistle at the proper places before reaching the crossing where the accident occurred. The appellant contends that these signals were not given. There is no serious dispute about the headlights. The evidence shows that they were lighted and in their proper places. The appellant undertook to show that the whistle was not blown nor the bell rung. Nine witnesses testified that they did not hear the bell ring nor the whistle blow. The testimony of all these witnesses was negative in character, and cannot prevail against the positive and conclusive testimony of the appellee, which clearly showed these duties to have been performed. This case comes under the rule stated by Mr. Justice Paxson in *Urias v. Pennsylvania Railroad Company*, 152 Pa. 326, 25 Atl. 566, wherein it is said: "One witness who hears the ringing of a bell is worth more than the testimony of a dozen witnesses who did not hear it, unless in some

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manner their attention had been especially called to it. The witness who heard the bell either tells the truth, or he tells a deliberate and willful falsehood, while the witness who did not hear the bell may be, and is probably, truthful. The bell may be rung or the whistle blown without attracting the attention of the persons who are familiar with such sounds." In *Culhane v. New York Central, etc., Railroad Co.*, 60 N. Y. 133, the following rule is stated: "A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

While our cases have not stated the rule so broadly as the New York case cited, yet this court has frequently said that, where the negative testimony amounts only to a scintilla, a jury cannot be allowed to disregard the positive and conclusive testimony which establishes the controverted fact. The presumption is that the trainmen of a railroad company perform their duty in these respects when a train approaches a crossing. *Pittsburg, etc., Railway Company v. Dunn*, 56 Pa. 280. In the case at bar, in addition to the presumption that the trainmen performed their duty, the defendant produced 14 witnesses who testified in the most positive terms that the signals were given at the proper places before the train reached the crossing. The engineer who blew the whistle and started the automatic ringer; the engineer of the second engine, whose duty it was to listen for the signal, so that, if the first engineer failed or neglected to blow the whistle, it was his duty to do so; the man who was pulling the rope that rang the bell; the man sitting in the cab and on whose shoulder the bell rope rubbed every time it was pulled; and 10 other witnesses whose duty it was to watch for these signals—all testified in positive terms that these signals were given. Of the 9 witnesses produced by the plaintiff and who testified that they did not hear the signals, one was shut up in a water tank; another in a boiler house; another in a dwelling house near the switch, about 2,200 feet from the whistling post, shut off by an intervening hill; another was in an engine house; another in a caboose of the freight train, nearly half a mile away; another stood near the water tank, close to the passing freight train; and none of them had any duty to perform which called their attention to the signals. The night was stormy, high winds were blowing, and the weather conditions such as to make it difficult for these witnesses to hear the signals. Under such circumstances, the negative testimony of these witnesses amounted only to a scintilla, and must give way to the overwhelming weight of the positive testimony produced by the defendant. In *Lonzer v. Lehigh Valley Railroad Co.*, 196 Pa. 610, 46 Atl. 937, this court said: "The verdict should have been set aside as in direct disregard of the evidence, and, where that is the case, the court may refuse to submit it at all and direct a verdict accordingly." Under these circumstances the learned court below was justified in

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refusing to submit the question to the jury and in saying that the plaintiff had failed to establish the negligence complained of. This view of the case being conclusive of the questions involved in this controversy, it is unnecessary to discuss the alleged contributory negligence of the appellant.

Judgment affirmed.

RISQUE'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia, Sept. 26, 1905.)

[51 S. E. Rep. 730.]

Railroads—Injury to Licensee—Negligence.*—Where a railroad company furnished defective cars to the employer of plaintiff's intestate for use upon the employer's side track, to be loaded and unloaded upon such side track, it was the employer's duty to inspect the cars for defects, and the railroad company was not liable for the death of plaintiff's intestate caused by such defective cars.

Same—Contributory Negligence.—Where plaintiff's intestate, who was operating a switch engine upon private tracks, backed his engine upon the track of defendant railroad company at a time when he knew a passenger train was due, he was guilty of contributory negligence, precluding a recovery for his death caused by collision with the passenger train in question.

Appeal from Circuit Court, Rockbridge County.

Action by Risque's administrator against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hugh A. White, for appellant.

Robert L. Parrish, for appellee.

HARRISON, J. This action was brought to recover damages for the alleged negligent killing of the plaintiff's intestate in a collision between an engine of the Alleghany Ore & Iron Company, which owns and operates the Buena Vista Iron Furnace, and a passenger train of the Chesapeake & Ohio Railway Company, at a crossing near Buena Vista.

There was a demurrer to the evidence, and a judgment thereon

*For the authorities in this series on the subject of the duty of a railroad company, or other master, as an employer, to inspect foreign cars, see foot-note appended to *Woods v. Northern Pac. Ry. Co.* (Wash.), 15 R. R. R. 365, 38 Am. & Eng. R. Cas., N. S., 365; monograph, 4 R. R. R. 441, 27 Am. & Eng. R. Cas., N. S., 441.

As to whether a railroad transferring cars to another company is liable for injuries to latter's employees from defects in such cars, see foot-note appended to *Missouri, K. & T. Ry. Co. v. Merrill* (Kan.), 5 R. R. R. 209, 28 Am. & Eng. R. Cas., N. S., 209; *Lellis v. Michigan C. R. Co.* (Mich.), 18 Am. & Eng. R. Cas., N. S., 545; *Teal v. American Min. Co.* (Minn.), 23 Am. & Eng. R. Cas., N. S., 314; *Sheltrawn v. Michigan Cent. R. Co.* (Mich.), 23 Am. & Eng. R. Cas., N. S., 711; *Union Stock-yards Co. v. Goodwin* (Neb.), 12 Am. & Eng. R. Cas., N. S., 502; note 9 Am. & Eng. R. Cas., N. S., 788; *Louisville & N. R. Co. v. Veach* (Ky.), 11 Am. & Eng. R. Cas., N. S., 24.

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in favor of the defendant, and thereupon the case was brought to this court.

We are of opinion that the demurrer to the eighth and ninth counts of the declaration was properly sustained. These counts aver that the defendant railway company was guilty of negligence in furnishing the ore and iron company cars without brakes, or with unsound brakes, to be handled upon its yards, and assume that this alleged negligence rendered the defendant liable to the plaintiff's intestate for any injury he may have sustained in the use of such cars.

The plaintiffs' intestate was an employee of the Alleghany Ore & Iron Company. The declaration shows that the cars were delivered by the railway company to the ore and iron company on a side track, to be moved, and either unloaded of freight belonging to the ore and iron company or loaded with the product of that company. If these cars were without brakes, or equipped with unsound brakes, it was the duty of the ore and iron company to ascertain the fact by proper inspection, and either remedy the defect or decline to use the cars. No relation of employer and employee existed between the defendant company and plaintiff's intestate, and, if he suffered any injury by reason of the cars in question being without brakes or equipped with unsound brakes, the liability, if any, would rest upon his master, the Alleghany Ore & Iron Company, for failing to make proper inspection, and not upon the defendant railway company. *Baltimore & Potomac R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; *Texas Pac. R. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. See 20 Am. & Eng. Enc. Law, pp. 80, 81, and 23 Am. & Eng. Enc. Law, p. 731.

We are further of opinion that the demurrer to the evidence was properly sustained. The Chesapeake & Ohio Railway Company's passenger train No. 83 was approaching its Buena Vista station on schedule time. Five hundred and forty feet south of the station its main line is crossed by a track of the Alleghany Ore & Iron Company, said crossing being used by the latter company for delivering freight to and receiving it from the Chesapeake & Ohio and Norfolk & Western Railways. As the engine attached to the passenger train of the defendant company was passing over the crossing mentioned, the engine of the ore and iron company backed upon it, striking the tender attached thereto, and causing a wreck, which resulted in the death of plaintiff's intestate. The ore and iron company's yard, on which its engine was run before it reached the crossing, was obstructed by box cars on the side track near the crossing and by fog.

The defendant in error relies on several defenses; but as one is, in our opinion, conclusive of the case, it is unnecessary to advert to others.

The plaintiff's intestate was the engineer in charge of the engine of the ore and iron company, and at the time of the accident was engaged in shifting cars on the yard of his employer. While attempting to make what is called a flying switch, he

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backed his engine upon the defendant company's main line with his back to the railroad track, so that he could not see, and this at a time when he knew the defendant's passenger train was due at its Buena Vista station, and could not reach it except by passing over the crossing upon which he was backing his engine. Such negligence can only be characterized as reckless, if not wanton. If it were conceded that the defendant railway company was guilty of the negligence it is charged with in approaching its Buena Vista station, the contributory negligence of the intestate disclosed by the record would preclude a recovery. *Pittsburg R. Co. v. Browning* (Ind. App.) 71 N. E. 227; *Kelly v. Duluth R. Co.* (Mich.) 52 N. W. 81.

The case last cited is very similar in its facts to that at bar, except that the case in judgment is much stronger for the defendant. After stating the facts in that case, the court says: "Both of these engineers were reckless. Both knew that there were no semaphores, flagmen, or gates at this crossing. The view of each was obstructed. It was the duty of each, in the performance of his obligations to his employers, to see that the way was clear before attempting to make the crossing. A compliance with the statutory duty of stopping and giving the crossing signals did not relieve either from the duty of keeping his train under control, so that it could have been stopped in time to avoid the collision. The only difference in conduct was possibly in the rate of speed of the trains; but this does not excuse plaintiff in the neglect of a plain duty in the line of his employment. The trial judge was right in directing a verdict for the defendant, and the judgment is affirmed."

For these reasons the judgment complained of must be affirmed.

RUSSELL v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, Oct. 3, 1905.)

[61 Atl. Rep. 899.]

Railroads—Duty to Fence.—A railroad company owes no duty of fencing its road, as to the owner of a horse being pastured in the pasture of a third person, which does not join the railroad location, even if the owner has a right to lead the horse over the land between the pasture and the railroad.

Same—Horse on Track—Duty of Employees.*—Where the horse was an estray, unlawfully at large and a trespasser upon a railroad

*For the authorities in this series on the question of the care required of trainmen to avoid injuring stock unlawfully at large, see foot-notes appended to *Laronde v. Boston & M. R. R.* (N. H.), 16 R. R. R. 223, 39 Am. & Eng. R. Cas., N. S., 223.

For the authorities in this series as to whether trainmen must lookout to avoid injuring stock, see foot-note appended to *Prescott & N. W. Ry. Co. v. Brown* (Ark.), 16 R. R. R. 132, 39 Am. & Eng. R. Cas., N. S., 132; foot-note appended to *Central of Georgia Ry. Co. v. Sport* (Ala.), 14 R. R. R. 774, 37 Am. & Eng. R. Cas., N. S., 774.

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track, the railroad company did not owe the owner of the horse the duty of exercising reasonable care to avoid injuring the horse. It owed no duty, except the negative one that it should not wantonly injure the horse. Its servants were not bound to be on the lookout, lest they should run into a trespassing horse. They were not bound to use any care with respect to the horse, unless they knew the horse was on the track before them.

Same—Liability for Injury.†—In such case, the railroad company is not liable to the owner of the horse, unless it appears that there was reckless and wanton misconduct on the part of its servants in the management of the train after the horse was known by them to be on the track, and that such misconduct caused the death of the horse. The burden of showing this is on the owner of the horse.

Same—Evidence.—In the opinion of the court, the circumstances relied upon by the plaintiff entirely fail to prove that the defendant's engineer had knowledge that the horse was on the track, and therefore that his conduct in running down the horse was reckless and wanton. They raise a conjecture, but do not amount to proof. The facts ascertained are too uncertain to warrant the inference which the jury drew.

(Official.)

On motion from Supreme Judicial Court, Androscoggin County.

Action by A. E. Russell against the Maine Central Railroad Company to recover for the value of a horse killed by defendant's train. Motion by defendant to have verdict for plaintiff set aside. Sustained.

Argued before EMERY, STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

McGillicuddy & Morey, for plaintiff.

White & Carter, for defendant.

SAVAGE, J. The plaintiff sues to recover the value of a horse killed by the defendant's freight train. The horse was being kept for hire in the pasture of a third party. Between the pasture and the railroad location was a field owned by the same party, through which the plaintiff had a right to lead the horse to and from the pasture, but in which he had no right to turn it loose. The horse broke out of the pasture in the nighttime, crossed the field, and went onto the railroad track, at a place adjoining the field where there was no fence. It followed the track for nearly two miles, when it was overtaken by the train and killed. The plaintiff's declaration counts on the failure of the defendant to maintain a suitable, legal, and sufficient fence along its way, adjoining the land used for pasturing. Rev. St. 1903, c. 52, § 26. But the proof in this respect fails, because the pasture where the plaintiff pastured his horse, and where only he had a right to pasture it did not adjoin the railroad location. Under

†For the authorities in this series on the question as to the burden of proving negligence, or its absence in actions for killing stock on track and whether a presumption of negligence arising from the fact that stock is killed by a train, see foot-note appended to *Western & A. R. Co. v. Clark* (Ga.), 15 R. R. R. 440, 38 Am. & Eng. R. Cas., N. S., 440.

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such circumstances the defendant owed no duty to the plaintiff to fence its road. *Byrnes v. B. & M. R. R.*, 181 Mass. 322, 63 N. E. 897. Though the owner might lawfully lead his horse across the land between the pasture and the railroad location, he had no right to let the horse go at large across it. And, if he did so, the horse was an estray out of the pasture, and the railroad company owed no duty of fencing against the horse so situated.

In his declaration the plaintiff also alleges that the defendant negligently run its locomotive upon the horse then upon the railroad track for want of a sufficient fence to prevent it; and upon this ground alone the plaintiff seeks to retain his verdict. Waiving the question whether the declaration as a whole sufficiently sets forth a claim of negligence by the defendant in operating its locomotive and train, we proceed to inquire whether there is sufficient evidence in the record to warrant a jury in finding that the defendant was negligent in this respect.

The plaintiff's horse was an estray, unlawfully at large and a trespasser upon the defendant's railroad track. The defendant did not owe to the plaintiff the duty of exercising reasonable care to avoid injuring the horse, as would have been the case if the horse had been lawfully upon the track. It owed no duty, except the negative one that it should not wantonly injure the horse. That is the only duty owed to a licensee. *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761. No more is owed to a trespasser. *Maynard v. B. & M. R. R.*, 115 Mass. 458, 15 Am. Rep. 119. The servants of the defendant were not bound to be on the lookout lest they should run onto a trespassing horse. *Davis v. B. & M. R. R.*, 70 N. H. 519, 49 Atl. 108. They were not bound to use any care with respect to the horse, unless they knew the horse was on the track before them. The defendant is not liable to the owner of the horse, unless it appears that there was reckless and wanton misconduct on the part of the defendant's employees in the management of the train after the horse was known to them to be on the track, and that such misconduct caused the death of the horse. The burden of showing this is on the plaintiff. *Darling v. B. & A. R. R. Co.*, 121 Mass. 118; *Chenery v. Fitchburg R. R.*, 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; *Frost v. Railroad*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Railroad v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112.

The train, consisting of 36 freight cars, appears to have been moving at an usual and proper rate of speed. It was midnight. There was nearly a full moon. The defendant says the night was cloudy. But this is denied by the plaintiff. We assume that the latter is correct. The headlight on the locomotive lighted the track ahead for about 150 feet. The engineer testifies that he did not see the horse until it came within the light of the headlight, and that he then shut the steam off and blew the whistle. But it was too late to avoid the accident.

On the other hand, the plaintiff shows, from the appearance of

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the tracks of the horse, that it was "on the run" from three-quarters of a mile to a mile before it was struck by the locomotive. It is argued that the horse was frightened by the approach of the train, and ran that distance in front of it. It is claimed that the engineer must have seen it, and, therefore, that it was wanton and reckless conduct in him not to stop the train or slacken its speed before the collision. But we do not think the evidence warrants such a conclusion. We have conjecture, not proof. No one knows, so far as the case shows, how far ahead the horse was when it was startled into a run by the noise of the approaching train. It is purely conjectural how far ahead of the train the horse ran until he came to a place where the track crossed over a brook, where the plaintiff claims he was stopped by the brook, and where he was killed. The train was moving at a speed of 20 miles an hour. The horse, as the owner testifies, could "pull a wagon at a 2:40 gait." The horse might, for a while at least, keep well ahead of the locomotive. It may be that the horse was near enough to be seen all the time, even by moonlight, and it may be that it was not. To say, upon the evidence, that it was, would be to substitute guesswork for proof. It may be that the engineer could have seen the horse if he had looked. It is not enough to show merely that he might have seen. It must be shown that he did see; for, unless he saw, there was no reckless or wanton misconduct on his part. While the circumstances surrounding a man may be such in some cases as to warrant reasonable men in believing, in spite of his denial, that he saw some object in question, we do not think the circumstances in this case warrant the finding that the engineer actually saw the horse in season to prevent the accident. See *McTaggart v. Maine Central R. R. Co.*, 100 Me. 223, 60 Atl. 1027. Jurors may draw legitimate inferences from ascertained facts. But here the facts ascertained are too uncertain to warrant an inference. They are not such as to lead a reasoning mind to a definite conclusion. In other words, they fail to prove.

Motion for a new trial sustained.

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(Supreme Court of Alabama, Feb. 9, 1905.)

[39 So. Rep. 282.]

Railroads—Operation of Trains—Duty to Look for Travelers.*—

The operatives of a railroad train are under no obligation to keep a lookout for persons traveling near the track on a thoroughfare which is not a public highway.

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to frightening teams, see foot-note appended to *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 14 R. R. R. 806, 37 Am. & Eng. R. Cas., N. S., 806; foot-note appended to *Fares v. Rio Grande Western R. Co.* (Utah), 13 R. R. R. 76, 36 Am. & Eng. R. Cas., N. S., 76.

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Same—Frightening Animals—Discovered Peril.—Where plaintiff was driving near defendant's railroad upon a thoroughfare which was not a public highway, it was the duty of defendant's servants in charge of a train, the movements and sounds of which had frightened plaintiff's mule, to use every means at hand which a man of ordinary prudence would have used to allay the fright of the animal, after becoming aware that it was frightened.

Same—Willful Injury—Causing Unusual Noise.—Where the operatives of a train have knowledge that a person driving a vehicle is near the track, they are guilty of negligence, if they cause the engine to make unusual noises calculated to frighten an animal of ordinary gentleness.

Same—Actions—Instructions—Contributory Negligence.†—In an action against a railroad company for injuries sustained by plaintiff while attempting to dismount from a vehicle, a mule attached to which had been frightened by defendant's train, a charge that if plaintiff, in attempting to get out, did what others similarly situated would have done, he would not be guilty of contributory negligence, was erroneous, inasmuch as the propriety of plaintiff's conduct was to be judged by what men of ordinary prudence would have done.

Same—Influence of Excitement.‡—A charge that, if plaintiff was in a perilous position and enacted under influence of fear or excitement produced by the negligence of defendant, his acts would not amount to contributory negligence, was erroneous for the same reason.

Appeal from City Court of Bessemer; B. C. Jones, Judge.

Action by James A. Fulton against the Alabama Great Southern Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

As amended the complaint contained 10 counts. The court gave the general affirmative charge as to all of these counts, with the exception of the fourth and tenth.

The fourth count, as last amended, was in words and figures as follows: "The plaintiff claims of the defendant the further sum of \$10,000 as damages, for that heretofore, on, to wit, 17th day of October, 1901, defendant was running or operating a certain locomotive engine and a train of cars upon and along a line of railway at or near Bessemer, in Jefferson county, Ala.; that said railway was intersected at a point near the said Bessemer by a public highway or a thoroughfare much used by pedestrians and vehicles at and about said point of intersection; that on said date plaintiff was traveling along and upon said highway or thoroughfare in a vehicle drawn by a mule, and was near said point of intersection, expecting to cross said railway at said point, but before making the attempt plaintiff stopped

†See foot-note appended to *Southern Ry. Co. v. Horine* (Ga.), 15 R. R. R. 427, 38 Am. & Eng. R. Cas., N. S., 427.

‡For the authorities in this series on the question whether error of judgment, caused by fear, in avoiding danger, constitutes contributory negligence, see foot-notes appended to *Morey v. Lake Superior Terminal & Transfer Ry. Co.* (Wis.), 16 R. R. R. 113, 39 Am. & Eng. R. Cas., N. S., 113; *Kansas City-Leavenworth R. Co. v. Langley* (Kan.), 15 R. R. R. 433, 38 Am. & Eng. R. Cas., N. S., 433; *Chretien v. New Orleans Ry. Co.* (La.), 15 R. R. R. 262, 38 Am. & Eng. R. Cas., N. S., 262; *Mannon v. Camden Interstate Ry. Co.* (W. Va.), 15 R. R. R. 312, 38 Am. & Eng. R. Cas., N. S., 312.

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said vehicle to ascertain whether there was danger of colliding with any locomotives that might be passing along and upon said railway, and discovered not far distant from said point of intersection, and about to be propelled in that direction, defendant's said locomotive and train of cars; that the engineer or some one in charge of said locomotive caused the same to be propelled along and upon said railway in the direction of said crossing, and at short intervals caused escapes or emissions of large quantities of steam or other substance from said locomotive, and caused the driving wheels thereon to be violently whirled or revolved around or upon the rails of said railway, all of which produced or caused to be made great noises, at which said mule became much frightened and agitated. And plaintiff further avers that the engineer or other person in charge of said engine, at or about the time of or just before reaching the point where plaintiff was, with great recklessness and negligence unnecessarily caused the steam to escape from the said engine, or the whistle thereof to be sounded, which was calculated to frighten a mule of ordinary gentleness, the sight and noise of which frightened said mule, and caused him to run away with the said vehicle, and the plaintiff was thereby thrown therefrom, or, in an effort to escape from the same, was violently thrown to the ground, and severely injured; that his flesh was torn, bruised, and mangled, and he was otherwise injured. In consequence thereof, plaintiff was made sore and sick, and suffered great mental anguish and physical pain, and was for a long time rendered wholly unable to work, and was permanently injured, and was put to great expense and trouble in and about procuring medicine, medical attention, care, and nursing, in an effort to cure and heal his said wounds and injuries."

The tenth count, as last amended, after containing substantially the same prefatory averments as did the fourth count, above set out, then contains the following averments: "That at or just about the time said vehicle was stopped plaintiff discovered defendant's said engine, which was not far from said crossing or intersection, and which was at the time being about to be propelled along said railway toward said point of intersection; that about the time said engine was opposite, or just before the same reached the point opposite, where plaintiff was, the said mule became frightened at the said engine, or the noises made thereby or emanating therefrom, or the sight thereof, which was known to the defendant, or by the exercise of ordinary care could have been known, yet after such knowledge or notice the defendant's engineer or other employee in charge of the said engine negligently caused or allowed large quantities of steam or other substance to be unnecessarily emitted therefrom, or the whistle thereof to be sounded, or negligently caused or allowed the driving wheels of said engine to be violently revolved, thus causing or producing unnecessary or unusual noises, which was calculated to frighten a mule of ordinary gentleness, and as a proximate consequence thereof said mule did run away, and the

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plaintiff was thrown violently to the ground and run upon by a wheel of said vehicle, and dragged a long distance, and his flesh was bruised, mangled, and torn, and he was otherwise injured; and as a result he was made sore and sick, and suffered great mental and physical pain, and was for a long time rendered wholly unable to work and earn money, and was permanently injured, and was put to great expense and trouble in and about procuring medicine, medical attention, care, and nursing, in and trying to heal and cure his said wounds and injuries, all to his damage in the sum of \$10,000. Wherefore he sues."

To the fourth count of the complaint, as amended, the defendant demurred upon the following grounds: (1) For that said count shows that the negligence complained of did not contribute to the injury and damage alleged. (2) For that said count does not aver or show that any wrong or negligence of the defendant was the proximate cause of the accident and injury complained of. (3) For that said count fails to allege or show that the acts complained of were calculated to frighten a mule of ordinary gentleness. (4) For that said count shows that plaintiff was a licensee, and yet claims damages for simple negligence. (5) For that said count shows that plaintiff was a bare licensee and yet claims damages for simple negligence. (6) For that said count shows on its face that the only duty defendant owed plaintiff was not to wantonly or intentionally injure him, and yet it claims damages for simple negligence. (7) For that said count states no cause of action against this defendant, in that it does not show wherein defendant violated any duty it owed the plaintiff. (8) For that said count states no cause of action in this: that it does not allege or show that the emissions of steam or the blowing of the whistle were wantonly done, or done with intent to frighten plaintiff's mule. (9) For that said count is indefinite and uncertain, in that it does not show this defendant whether it is called on to defend an action for causing steam to be emitted, or whether it is the blowing of a whistle that is relied on by plaintiff. (10) For that negligence is alleged in the disjunctive. (11) For that said count shows that there was no negligence or breach of duty on the part of the defendant and yet denominates the same as negligence. (12) For that in said count negligence is averred merely as a conclusion of the pleader.

The demurrers to the tenth count were as follows: (1) Defendant assigns separately and severally as grounds of demurrer to the tenth count of the complaint all those grounds of demurrer hereinabove assigned to the fourth count of the complaint as amended, and the following grounds. (2) For that said count does not allege that the movement of the engine, the emission of steam or other substance, the blowing of the whistle, or the revolving of the driving wheels, were wantonly done, or done with the intention of frightening plaintiff's mule. (3) For that said count does not inform this defendant whether it is brought here to defend an action for the emission of steam or other

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substance, or for revolving driving wheels, or for blowing the whistle.

These demurrers to the fourth and tenth counts were each overruled, and thereupon defendant filed a plea of the general issue, and special pleas setting up the contributory negligence of the plaintiff: "The undisputed facts in the case were as follows: That on the 17th day of October, 1901, plaintiff and Otton Pasquale were coming back towards Bessemer, from a farm in the country, along a private road, Pasquale driving, with a mule hitched to a wagon. The mule was gentle. When near the track on which a train of defendant was, the wagon was stopped, because it was seen that an engine of defendant was coming towards the crossing. This engine was pushing some cars, and was going in an easterly direction. The cars and engine passed the crossing, until the engine was some feet beyond it. The engine was then reversed and started back, pulling the cars in a westerly direction. The ground was slightly upgrade going west. While engine was going east, there was no unusual noise of any kind, and the mule stood perfectly quiet until the engine had passed her. When the engine was reversed and came back in a westerly direction, the mule took fright at the noise caused by the engine, and Pasquale jumped out to hold the mule. The mule started to turn around, and cocked the wagon up on one side to some extent, and Fulton, being somewhat alarmed, attempted to get out of the wagon and was severely injured in doing so." The other facts are sufficiently stated in the opinion.

At the request of the plaintiff the court gave to the jury the following written charges: (a) "I charge you, gentlemen, that, if you believe from the evidence that plaintiff in attempting to get out of the wagon did what others similarly situated would have done, then that would not be contributory negligence on his part." (b) "If you believe from the evidence that plaintiff was placed in a perilous position by the negligence of defendant, or if he acted under influence of fear or excitement produced by the negligence of defendant, then such act would not be contributory negligence, and would not bar his right to recover." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusing to give each of the following written charges requested by it: (1) "If you believe the evidence, you must find for the defendant." (2) "If you believe the evidence, you must find for the defendant on the fourth count of the complaint, as amended." (7) "If you believe the evidence, you must find for the defendant on the tenth count of the complaint, as amended." (12) "The court charges you that, before plaintiff can recover in this case, he must show to your reasonable satisfaction from all the evidence in the case that the engineer or other person in charge of the engine caused steam to escape from it in a manner which was unnecessary to the operation of the engine at the time and place of the accident." (22) "The undisputed evidence in this case is that the road on which plaintiff was was a private road,

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and not a public highway; and I charge you that there was no duty on defendant's engineer to keep a lookout for parties or teams standing near the railroad track at that place." (28) "I charge you that, under the evidence in this case, it would not be negligence on the part of defendant's engineer, for which plaintiff can recover for the defendant's engineer to operate his engine, making unusual noises, or causing the wheels to be revolved unnecessarily, or steam to escape unnecessarily, one or both, unless at the time he knew of plaintiff's position near the track." (29) "I charge you that under the evidence in this case it was not the duty of the engineer to be on the lookout for any one standing near the track at the place where plaintiff was in the wagon, and that, if you believe from all the evidence in the case that defendant's engineer did all he could do to stop the engine of defendant as soon as he discovered plaintiff's peril, then you will find for the defendant." (32) "Carelessness or misconduct by the engineer on defendant's track, or unnecessary actions on his part, or even all of those acts and omissions combined, do not constitute what is designated as simple negligence as to any one remote from the track or crossing, and so situated that, in the performance of his ordinary duties on defendant's track, the engineer ordinarily would not notice such persons." (33) "If you believe from the evidence that defendant's engineer caused unusual and unnecessary noises to be made by the engine, and that from this action on part of the defendant's engineer the mule took fright and plaintiff was injured, you must find for the defendant, unless you further believe from the evidence that defendant's engineer knew that plaintiff was near the track at the time those noises were made." (35) "If you believe from the evidence that the engineer of defendant did all in his power known to skillful engineers to stop the engine as soon as he realized plaintiff's peril, you must find for the defendant."

There were verdict and judgment in favor of the plaintiff, assessing the damages at \$1,500.

A. G. & E. D. Smith, for appellant.

Ward & Drennen, for respondent.

MCCLELLAN, C. J. The plaintiff, of course, had a right to be where he was, and as he was, when he was injured in consequence of his mule becoming frightened by defendant's train. But the road along which he had been traveling, and upon which it was his purpose to cross the railway as soon as defendant's train or engine got out of the way, was not a public road. Therefore defendant's trainmen were under no duty to keep a lookout for him, but their duties in respect of him arose only after they became aware of his presence and peril. If, after becoming aware that his mule was becoming frightened by the engine, or the noises being made by the operation of the engine, they failed to use every means at hand, which a man of ordinary care and prudence would have had recourse to, to allay the fright of the animal, such as abating the noises, stopping the

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engine, that being practicable, etc., and injury resulted from such failure to the plaintiff, the defendant would be liable in damages in this action. *Glass v. Memphis & Charleston R. R. Co.*, 94 Ala. 581, 10 South. 215; *Ala. Great Southern R. R. Co. v. Linn*, 103 Ala. 139, 15 South. 508; 23 Am. & Eng. Ency. Law, pp. 744, 745. The defendant would also be liable, if the trainmen, knowing of the proximity of the plaintiff with his vehicle and mule to the track, unnecessarily caused the engine to make unusual noises calculated to frighten a mule of ordinary gentleness, and such noises did frighten this mule and thereby caused plaintiff to be injured; and this, of course, though the animal gave no indication of fright prior to the noises. Under the foregoing principles, the fourth count—the case being tried on that and the tenth count—sufficiently states a cause of action; but the tenth count is bad, for that it seeks alternatively a recovery for the failure of defendant's trainmen to know of plaintiff's presence and peril. This count is not supported by the evidence in respect of its averments as to the character of the road which plaintiff was traveling, if these averments are to be construed as describing a public road in the recognized meaning of those words, the sort of road as to which the statute imposes the duty of keeping a lookout upon trainmen.

There was evidence tending to show that the trainmen were negligent after discovering the fright of the mule, and from which the jury might have found that the injury resulted from such negligence; but there was also evidence to the contrary, and that issue was for the jury. There was also evidence tending to show that the trainmen, after becoming aware of the presence of the mule, with plaintiff in the vehicle to which it was hitched, and before there were any indications of fright in the mule, caused the engine to emit unusual and unnecessary noises, calculated to frighten a mule of ordinary gentleness, and which did frighten this mule and cause the injury complained of. Upon this it was open to the jury to find for plaintiff, though there was no pretermision of duty on the part of the trainmen after the mule became frightened; but there was evidence to the contrary, and this, too, was an issue for the jury. It follows that the court properly refused to give the affirmative charge requested by the defendant.

But the court's rulings on several of the other charges requested by defendant and refused were at variance with the law as we have declared it, in that such rulings proceeded on the theory that the trainmen owed the plaintiff the duty of operating the engine with reference to his presence there, though they were unaware of such presence or his peril. Charge "a," given plaintiff, should have measured his conduct in getting out of the vehicle by comparison with what the jury should find men of ordinary prudence would have done under the circumstances. Charge "b," given for the plaintiff, is also subject to criticism. Here, too, the standard is what a reasonably careful and prudent man, considering the particular exigencies of his situation,

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would have done. *Holland v. Tenn. Coal, Iron & R. R. Co.*, 91 Ala. 444, 8 South. 524, 12 L. R. A. 232; *Richmond & Danville R. R. Co. v. Farmer*, 97 Ala. 141, 12 South. 86; *Central of Georgia Ry. Co. v. Foshee*, 125 Ala. 199, 215, 216, 27 South. 1006.

We find no error in the rulings of the court on the admissibility of testimony.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

HICKEY v. RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah, July 11, 1905.)

[82 Pac. Rep. 29.]

Railroads—Persons in Yards—Injuries—Negligence—Evidence.—In an action against a railroad for injuries to a teamster engaged in loading his dray from a freight car, such injuries being caused by his horses taking fright at a sudden escape of steam from a locomotive, evidence held sufficient to show that the steam escaped from the cylinder cocks, which were under control of the engineer, and not from some appliance which was not subject to the engineer's control.

Same—Duty of Railroad.*—A railroad owes teamsters who are rightfully in its yard engaged at lawful work the duty of exercising reasonable care and vigilance in the movement and operation of its engines and cars so as to avoid injuring them, and is liable for injuries to such teamsters resulting from their teams taking fright at noises such as the escape of steam made necessarily or negligently.

Same—Negligence of Engineer—Question for Jury.—In an action against a railroad for injuries to a teamster engaged in loading his dray from a freight car, such injuries being caused by his horses taking fright at a sudden escape of steam from a locomotive, whether the engineer was in the exercise of ordinary care, or whether he needlessly or negligently permitted the steam to escape, held under the evidence, a question for the jury.

Same—Contributory Negligence.—Whether the teamster was himself guilty of contributory negligence in the manner in which he managed and placed his team was also a question for the jury.

Same—Instructions.—An instruction that if the evidence showed that the escape of steam might have been either from an appliance over which the railroad's employees had control, or from an automatic appliance outside of their control, and did not show affirmatively that the escape of steam was not from such automatic appliance, there could be no recovery, was properly refused, where the court did charge that the burden was on plaintiff to establish by a preponderance of the evidence the allegations of his complaint, naming them; that he must further establish that the escape of steam was the result of some act or omission of defendant's employees; that it must ap-

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to persons, other than passengers, at stations and depots on business, see foot-note appended to *Quantz v. Southern Ry. Co. (N. Car.)*, 15 R. R. R. 259, 38 Am. & Eng. R. Cas., N. S., 259; foot-note appended to *Fremont, etc., R. Co. v. Hagblad (Neb.)*, 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; foot-notes appended to *Anderson v. Seattle-Tacoma Interurban Ry. Co. (Wash.)*, 14 R. R. R. 380, 37 Am. & Eng. R. Cas., N. S., 380.

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pear, not only that the escape of the steam was under the control of the employees, but that it was unusual and unnecessary, or recklessly and wantonly done; and that negligence could not be inferred from the mere fact that the accident happened, nor from the fact that steam escaped from the engine.

Same—Evidence.—Testimony of the failure to give signals or warning when the engine was started and put in motion towards plaintiff's team was competent on the issue of an alleged act of negligence consisting of such failure to give signals, and also on the issue of the engineer's care in handling his engine and his regard for plaintiff's rights, and on the issue of plaintiff's contributory negligence.

Same—Instructions.—The court having fully charged on the issue of plaintiff's contributory negligence, a further charge that if plaintiff, in failing to block the wheels of his team or failing to keep a lookout for the approach of the engine, was not in the exercise of ordinary care, etc., the verdict should be for defendant, was properly refused, as superfluous and as improperly singling out isolated facts and confining the attention of the jury to them.

Trial—Instructions—Form.—It is sufficient if the jury are properly instructed in substance, and the court need not adopt the form of language presented by counsel, but may choose that mode of expression which he deems best adapted to intelligently state the law to the jury on the requested subject-matter.

Same—Unnecessary Instructions.—Where the court expressly and affirmatively charged the jury that plaintiff, before he was entitled to a verdict, must establish specifically enumerated propositions by a preponderance of the evidence, which was defined as the greater weight of the evidence, it was not necessary for the court to charge to find for defendant, if the weight of the evidence was in favor of defendant, or if it was equally balanced.

Same.—Where the case as submitted to the jury does not consist solely of issues of negligence raised on the complainant, but includes the affirmative issue of contributory negligence raised by defendant, a charge that, if the evidence is equally balanced, the issues should be found for defendant, is incorrect.

Negligence—Contributory Negligence—Burden of Proof.—The burden of proving contributory negligence is on defendant.

Bartch, C. J., dissenting.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by Daniel Hickey against the Rio Grande Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sutherland, Van Cott & Allison, for appellant.

Rogers & Street and *W. R. White*, for respondent.

STRAUP, J. 1. This is an action for personal injuries. The substance of the complaint is that appellant unnecessarily, negligently, and wantonly permitted steam to escape from one of its engines in its freight yard, where the respondent was engaged in unloading stoves from a box car onto a dray, thereby frightening his team, and in failing to give signals or warning of the approach of the engine. A verdict was had in favor of respondent, and appellant appeals.

The material facts, as disclosed by the evidence of respondent, show: That there were a number of tracks in appellant's freight yard at Salt Lake City, where the accident happened, running

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north and south. Respondent was there unloading stoves from a box car, standing on what was called the "team track," onto a dray drawn by a team of horses. The stoves were shipped and belonged to the Western Moline Plow Company, who had engaged the Salt Lake City Transfer Company to convey the goods from the car to its place of business. Respondent was in the employ of the transfer company. The box car containing the stoves was placed by appellant on the team track, there to be unloaded, and the goods to be received by the plow company. About 40 feet east of this track was another track running parallel with it. Respondent had backed his team opposite the door of the box car, so that his team was facing east. While there, with others, engaged in loading stoves, appellant propelled an engine upon and along the east track, passing respondent's team, and stopped to the north of them about 90 or a 100 feet. As the engine was standing there, the respondent and others noticed a man leaning out of the cab window, whom they took to be the engineer, and also saw a man standing in the gangway looking to the west. The ground was level, no objects intervening. It was broad daylight. Respondent could plainly see the men on the engine, and the engineer as plainly could see respondent's team and the men working about the dray. While the engine was standing at said place, respondent finished loading, drove his dray up about 3 feet, and began to tie his load at the back end. To do that, it was necessary for him to drive up that distance. While tying the stoves in the dray, the said engine, which had been standing about 5 or 10 minutes, without giving any signal or warning, was put in motion and run south about as fast as a horse would trot, and, when opposite respondent's team, steam was permitted to escape from the engine and against the horses, causing them with a flash to suddenly bolt back, pinning respondent against the box car, and injuring him. The heads of the horses were about 8 feet from the engine. Respondent saw the engine standing north of him, and saw what he took to be the engineer in his proper place in the cab; but, as stated by him, he did not know how long the engine would stay where it was, and did not know what they were going to do with it. The manner in which the engine was operated and the circumstances of the transaction are best described in the language of the witnesses themselves:

One witness, who was standing in the car door, stated: "While he [respondent] was engaged in tying the rope from one side of the hind end to the other, I observed an engine going south on the track just east of and adjacent to the track on which the box car was standing. At that time I saw steam which came from the engine. It made a noise. I didn't exactly see the steam come from the engine but I could see it come kind of under the engine and raise up in the horses' faces. When it first came in contact with the horses it struck them about on their knees, I should judge, and then it raised up over their heads. When the steam came in contact with the horses' legs

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and heads, they backed very quickly, and it caught Mr. Hickey between the dray and the car. I noticed that the steam came from the bottom of the engine down near the ground. I did not notice that the steam went down, instead of going up. It went more straight out. I couldn't say just where it came from, for the horses were between where I stood and where it came from, so I couldn't see. It came from the side of the engine toward the bottom." Another witness to the transaction stated: "When I first saw it [the engine] on this occasion, they backed in from the south, going north, with three or four cars, and stopped, I should judge, about 100 feet from the car where we were working. I saw it there, and saw the engineer and fireman, I suppose. They were dressed in overalls and cap. I remember about the time that the dray was loaded. Mr. Hickey was right in behind the dray at the time. The dray had been moved up for the purpose of roping the ranges in, and he was doing that work. I was standing in the car door, and Mr. Hickey was on the ground below me. We had just finished loading up this dray, and Mr. Hickey drove the team up and stepped in between the car and the dray to rope those ranges and stoves on, and all at once this engine came up, and right in front of those horses they shot off steam right from the cylinder. They came back with such a sudden move that Mr. Hickey did not have time to get out, and was crowded right in there. The engine went on a little farther and stopped, and one of the parties, the fireman or the engineer, came back. He looked at Mr. Hickey, who was then lying on the ground. When the engine shot off the steam it was right in front of the horses, about six or eight feet from their heads. As near as I can recollect the engine was almost directly opposite, and almost in the head of the horses, when the steam escaped. When they shot off steam that way from the cylinder it sounded like 'Shi! shi! shi!' I saw the steam, and it came from the cylinder cocks of this engine. The steam shot up in front of the horses and raised up. It was all under the horses' feet, and it came up over their heads. I couldn't say how far it ascended in the air above the ground. It covered the horses' heads, and was above the heads of the horses. When the steam was discharged, the horses backed with a quick motion, with this man behind the dray." On cross-examination, this witness stated: "The reason I said it came from the cylinder cocks is because I don't see how it would get out of the cylinder unless it did. I do not know of any other place that it would come out. I saw the steam come out, and I judged it came from the cylinder cocks, and that is because I don't know of any other place in the cylinder that it could go out." On redirect he stated: "When the steam came out from the engine, it went down to the ground and up."

Respondent also put in considerable evidence of expert witnesses, describing the mechanism of a steam engine, the position of the cylinder, cylinder cocks, channel cocks, steam chest, the automatic or relief valve, and the offices and functions of these

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various parts; that the cylinder cocks are located underneath the cylinder, the latter being about from 10 to 12 inches from the ground, and are situate on the right-hand side of the engineer, and are worked by him either by hand or foot, and are under his control; that when an engine stands for some little while there is some condensation of steam, which goes down into the cylinder, but that there should not be any condensation of steam to amount to anything, where an engine had stood from 7 to 10 minutes; that the steam chest is on top of the cylinder, and that the automatic or relief valve is on top of the steam chest, and that the purpose of it is that, if there is any leakage of steam, it will escape from the valve, and to let the steam escape while the engine is standing and when it is not under great pressure; that where an engine had been standing on a level track from 5 to 10 minutes, and then moved forward a distance of about 90 feet, it would not be necessary to discharge steam from the cylinder; that under such circumstances there would be no "thumping" or "pounding" of the cylinder on account of condensation of steam, and if there was condensation of steam in the cylinder the engineer could discharge it while the engine was standing or before it reached a distance of 70 feet, or it could be held without injury until the engine had traveled a distance of 100 feet—and put in other evidence tending to show that, under all the circumstances, it was not necessary to discharge steam at the time and place it was discharged.

Appellant introduced testimony from engineers, who, according to the dispatcher's train sheet, arrived with engines and operated in the yard at the day in question; but all of them denied any such circumstance taking place as testified to by the plaintiff and his witnesses, or as to the escape of steam and frightening a team, or injuring the plaintiff, or any one. The witnesses for appellant, having disclaimed any knowledge of the transaction, gave, therefore, no evidence as to the necessity of the escape of steam, or as to any circumstance attending the transaction. Appellant, however, put in expert evidence describing and explaining the construction and mechanism of a steam engine, the position of the steam chest, cylinder cocks, and relief valves, which did not materially differ from that of respondent's witnesses. It also gave evidence tending to show that, where there is condensation of steam, it is necessary to open the cylinder cocks, so as to relieve the cylinder and prevent damaging it, and that steam may escape, not only from the relief valve, but from the steam chest joints, and from imperfect or worn packing on the piston rod, and that, under some circumstances, it might be necessary to open the cylinder cocks after an engine had been standing from 7 to 10 minutes, and then moved from 75 to 100 feet; but some of them stating it was dependent upon whether there were any persons or teams in the vicinity, and dependent also upon the manner in which the engine was handled, and what was to be done with it, and some also stating that, assuming that an engine was ordinarily safe

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and in good repair and steam was seen coming out from under the engine, they would say it came from the cylinder cocks or the channel cocks, both of which are under the control of the engineer. Appellant introduced no testimony in respect to the engine in question, nor any evidence with respect to the circumstances nor the occasion of the escape of steam on the day and at the place in question. It, however, gave evidence as to the likelihood of the condensation of steam under the circumstances, hypothetically put to experts, and that, if there was condensation of steam in the cylinder, it was necessary that it be relieved therefrom, in order to prevent damage to the cylinder and the engine.

2. It is contended by appellant that its motion for nonsuit ought to have been sustained, or that its request to direct a verdict for it ought to have been given. This is claimed upon the grounds that there was no evidence showing negligence upon the part of the appellant, for that it is urged that the evidence does not show that the steam escaped from such portion of the engine as was under the control of the engineer, and that, at any event, it is not shown that the escape of the steam was unnecessary and unusual or was done negligently, and that the evidence affirmatively shows that the plaintiff was guilty of contributory negligence in going behind his dray, and in not observing a proper lookout for the engine, and in not blocking the wheels of his dray. It is claimed by appellant that, if the steam escaped from the automatic valve, or some appliance over which the engineer had no control, appellant was not liable; that to render it liable it was incumbent on respondent to show that the steam escaped from the cylinder cocks, or some appliance under the control of the engineer; that the evidence shows the steam may have come from the one as well as the other; and that, even though the steam came from the cylinder cocks, the evidence does not show its emission was unnecessary and unusual, or done negligently. Assuming, without deciding, that, if the steam escaped from the automatic or relief valve, appellant is not liable, and that respondent must show it was emitted from the cylinder cocks or some appliance under the control of the engineer, we are of the opinion that the evidence was sufficient to warrant a finding of the jury of such latter fact. While the positive and direct statement of the witness Harris, on his direct examination, that the steam did escape from the cylinder cocks, was somewhat weakened on cross-examination, and to some extent made to appear that he came to that conclusion because he did not know where else it could come from, yet the jury could well arrive at the fact that the steam came from the cylinder cocks, from the description given them of the position on the engine of the automatic valve, the cylinder cocks, and the course the steam took as it escaped from the engine, and from the office and functions performed by its various parts as explained to the jury by the experts and by drawings and illustrations. The evidence shows that the auto-

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matic valve was on top of the steam chest, while the cylinder cocks were underneath and at each end of the cylinder, which was from 10 to 20 inches from the ground. It appears, as testified to by some witnesses, that the steam came from under the engine, and by others that it shot out against the knees of the horses, and arose up over their heads; and there was evidence on the part of the experts that, if they saw steam come from under an engine which was in ordinary good repair, they would say it came from the cylinder cocks or channel cocks, both of which were under the control of the engineer, as was also shown by the evidence. It was also shown that the purpose of the automatic valve was to let the steam escape while the engine is standing still and when it was not under great pressure, although there may, under some circumstances, steam escape from the automatic valve while the engine is running, depending, however, largely upon the manner in which the engine is handled. We therefore conclude, from all the evidence and circumstances in the case, there was sufficient evidence from which the jury could well find the fact that the steam escaped from the cylinder cocks at the time in question.

We are also of the opinion that the evidence is sufficient to authorize the jury to find the fact that it was unnecessarily permitted to escape, and done under circumstances from which the jury could say it amounted to negligence. The only claim made by which it can be said that any necessity existed for the escape of the steam from the cylinder cocks was that while the engine stood there might have been, and probably was, condensation of steam in the cylinder in such quantity as to require it to be removed, and the cylinder relieved therefrom, in order to avoid damaging the cylinder and engine. But, to the contrary, there is evidence to show, and from which the jury could well find, that such was not the fact, and that ordinarily, under the circumstances as shown by the evidence, considering the length of time that the engine stood, the level ground, the condition of the weather, and the other circumstances shown, there would be no substantial or sufficient condensation of steam requiring it to be removed from the cylinder, and that, if there was such condensation of steam, it well could have been removed before the engine was put in motion, or before the engine arrived at the place where the team stood, or, that the engine, without injury or damage, could have been operated past the horses before discharging the condensed steam. The jury were authorized in finding that the engineer saw the team and the men about the dray engaged in loading; and there being evidence to show that the steam was discharged from the cylinder cocks against the horses when the engine was opposite them, and there being evidence showing that, if there was any occasion to relieve the cylinder from the condensed steam, it could have been done before the engine was put in motion, or before it reached the team, or after it passed them, the jury were warranted in finding that the steam was unnecessarily dis-

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charged at the particular time, and was not done with that prudence and care that one operating an engine under the circumstances should have used, and was, therefore, done negligently. While it is true appellant had the right to operate its engine in the yard at the time and place in question, and to make the usual and necessary noises incident to such operation, including the usual and necessary escape of steam, and that for the making of such noises, if made neither unnecessarily nor negligently, appellant would not be liable although the team took fright thereby and injured respondent. On the other hand, if such noises were made unnecessarily or negligently, and thereby respondent's team took fright, resulting in his injury, appellant would be liable. It was well stated: "The inquiry in every case, therefore, must be whether the company was exercising its rights in this respect in a lawful and reasonable manner, with a due regard to the rights of others who may be lawfully traveling in the vicinity of the railroad track; for it must be obvious that what may be due care in a thinly settled neighborhood or near an unfrequented road would be sheer negligence in a thickly settled town and on a street along which horses were being momentarily driven. Now, in the present case, we think it appears that the engine, although within the company's yard, was not managed with a due regard to the rights of the plaintiff, who was lawfully and in the exercise of proper care crossing its track. It does not appear that the engine might not have stopped at a much greater distance from the street, and where the steam might have been blown off without the danger of frightening horses lawfully crossing its track." *Petersburg R. R. Co. v. Hite*, 81 Va. 767.

It should also be conceded that respondent was rightfully in the yard and engaged in a lawful pursuit, not only with appellant's bare knowledge and consent, but by its recognition of his right. It owed a duty to him commensurate with those rights, and to so operate and handle its engines and cars as not to needlessly or unnecessarily expose him to injury. The jury were well authorized to find that the presence of respondent and that of his team were known, or ought to have been known, to the engineer. While the team was standing facing east between the two tracks, but 40 feet apart, the engine was operated past them, and stopped to the north of them about 90 or 100 feet, where the engine stood for 5 or 10 minutes, during all of which time the team remained and the loading was going on. During part of this time the engineer was leaning out of the cab window, and, when he put his engine in motion, the jury were justified in finding that the team and men working about the car and dray was seen and observed by him. Where teamsters, under such circumstances as here, are rightfully in the yard of appellant engaged at lawful work, it owes them a duty of all reasonable care and vigilance in the movements and operation of its engines and cars to avoid injuring them. *Newson v. N. Y. C. R. Co.*, 29 N. Y. 385; *Chicago*, etc.,

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R. Co. v. Goebel, 119 Ill. 515, 10 N. E. 369; *Stinson v. N. Y. C. R. Co.*, 32 N. Y. 333, 88 Am. Dec. 332; *Watson v. Wabash*, etc., *R. R. Co.*, 66 Iowa, 164, 23 N. W. 380. Here it may be said the team took fright, not only from the mere noise of the escaping steam, but from the fact that the steam was discharged against them. The jury may well have found that, as the team was but 8 or 10 feet from the engine and in plain view of the engineer, he ought to have known that the escaping steam was liable to strike the team, and, if so, it would be greatly disturbed, and injury likely to ensue. It was, therefore, a question of fact for the jury to say whether the engineer, at the time and place in question, was in the exercise of ordinary care, and as to whether the escaping steam was needlessly or negligently permitted. 23 Am. & Eng. Enc. Law, 744; 2 Shear. & Red. Neg. § 426; *Weil v. St. L. S. W. R. Co.*, 64 Ark. 535, 43 S. W. 967; 2 Thomp. Com. on Neg. §§ 1922-1925; *Railway Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Kalbus v. Abbott et al.* (Wis.) 46 N. W. 810; *Mitchell v. Nashville*, etc., *R. Co.* (Tenn.) 45 S. W. 337, 40 L. R. A. 426; *Hahn v. S. P. R. R. Co.*, 51 Cal. 605; *Presby v. Grand Trunk Ry.* (N. H.) 22 Atl. 554.

The claim made that respondent was guilty of negligence as matter of law is not tenable. He was where he had a right to be, and was rightfully engaged at and about his work. His team was gentle, and accustomed to being about the yard and about moving trains, and ordinarily was not disturbed by their ordinary operations. At the time of the accident he was engaged in the performance of a necessary and proper act—that of tying the hind end of the dray. To do so, it was necessary that the dray should be moved a few feet from the box car. The act which caused his injury was, as found by the jury, the needless discharging of steam against his team. Ought he, in the exercise of ordinary care, to have anticipated such an act and guarded against its consequences? If so, what precaution ought he to have taken? We can but say that he was required to use all the reasonable care that a prudent man under like circumstances would have used. Whether respondent came up to that standard or not was a question of fact. It was dependent upon the situation of the premises, the things there done and about to be done, together with all the facts and circumstances surrounding the case. It is said he ought to have blocked the dray wheels; he should not have gone behind the wagon at the time he did; when he drove up his team, he ought to have turned it north, facing the engine. We cannot, as matter of law or abstractly, say the doing or not doing of these and like things is negligence. For us here concretely to say the doing or not doing of these things was negligence on the part of respondent, when considered in light of all the circumstances, is ourselves to measure the conduct and actions of respondent by what we think a reasonably prudent man would have done under like conditions, and then to assert that respondent did or did not come up to that standard. It is quite apparent that to do or

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not to do these things may be negligence in some cases as matters of fact, in others not, and is dependent upon time, place, and circumstances. Here the evidence shows it was reasonably necessary, in loading, to back the wagon against the car, which resulted in the team facing east. When the wagon was loaded, in order to tie the back end, it was necessary that it be driven up. To now say, as matter of law, in a freight yard of numerous tracks, upon which different engines and cars are being operated, respondent should have turned his team facing north and facing the engine, and that anything done short of this was negligence, is most certainly invading the province of the jury; and the trier of the fact might very pertinently assert such an act would not have rendered the team less susceptible to fright or disturbance, or made respondent's position more safe from appellant's negligent act. Furthermore, there is evidence to warrant a finding that the team became disturbed and dashed back, not from the mere noise of escaping steam, but from its having been discharged against it. By their verdict the jury has found this was done negligently. To now say that respondent ought to have anticipated this act of negligence, and to have guarded against its consequences by the doing or not doing of these or like things complained of, is to say that one is in duty bound to anticipate the negligence of another. True, respondent knew the engine was standing where it was, 90 or 100 feet from his team, and that when it started up it was as apt to go south, past him, as to go north, away from him. The consequences of the ordinary and usual operations of the engine he was in duty bound to anticipate, and to use ordinary care to avoid them. But the whole duty to avoid consequences of appellant's operation of its engine did not rest upon respondent. Each owed to the other a duty, and use of ordinary care. Respondent had the right to expect that use of care from appellant. In order that he may be freed from the charge of contributory negligence, he was not required to expect or anticipate this care on the part of appellant would not be observed, and that, when the engine was opposite his team, steam would be negligently, as found by the jury, emitted from the engine and discharged against his team, and therefore should have guarded against consequences of such an act. Upon consideration of the whole matter, we are clearly of opinion that respondent's acts and conduct, like that of appellant, were here questions of fact for the jury, and their finding thereon is conclusive.

3. It is also contended that the following request of the appellant should have been given: "Therefore the court further instructs you that if the evidence in this case shows that the escape of steam may be either from an appliance over which the employees have control or from an automatic appliance which is outside of their control, and the evidence does not show affirmatively that the escape of steam was not from such automatic appliance, then your verdict must be for the defendant." Without deciding whether the request accurately states the law (see

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Presby v. Grand Trunk Ry. [N. H.] 22 Atl. 554; *Keech v. Rome, etc., R. R. Co.*, 59 Hun, 617, 13 N. Y. Supp. 149; *Railway v. Simon* [Tex. Civ. App.] 54 S. W. 309; *Duvall v. Ry. Co.* [Md.] 21 Atl. 496), it is sufficient for us here to say that the substance of the above request was given by the court. After the court charged the jury that the burden was on the plaintiff to establish by a preponderance of the evidence the allegations of his complaint, naming them, before he was entitled to a verdict, it then stated: "He must further establish by a preponderance of the evidence that the escape of steam from the engine at the time and place under the circumstances shown by the evidence was the result of some act or omission of an employee or employees of the defendant company, which such employee or employees could have controlled. Before you are warranted in finding a verdict for the plaintiff in this case, it must appear from the evidence, not only that the steam was permitted to escape from the engine, and that the escape of such steam was a matter under the control of the employees, but it must be shown further that the escape of such steam at the time and place and under the circumstances shown by the evidence was both unusual and unnecessary, or that it was recklessly and wantonly done, or with the intention of frightening plaintiff's team. You are further instructed that the defendant railway company has the right to operate its railroad and make the usual noises and permit the usual escape of steam from its engine which are incident to the use of such engine. The court further instructs you that negligence upon the part of the defendant company cannot be inferred from the mere fact that this accident happened, nor from the fact that steam escaped or was permitted to escape from the engine. The plaintiff must further show that the escape of steam at the time and place, and under the circumstances shown by the evidence in the case was not in the exercise of ordinary care and prudence." It will thus be seen that the jury were several times told that, in order to find for the plaintiff, they must find by a preponderance of the evidence that the escape of steam was a matter under the control of the employees operating the engine, and that such escape of steam was unusual and unnecessary, or was done negligently or intentionally.

4. It is also claimed that the court erred in admitting in evidence testimony to the effect that, when the engine was started and put in motion, and operated towards respondent's team, no signal or warning was given. The failure to give signals or warnings was alleged in the complaint as negligence. Such evidence was, therefore, competent to prove such alleged acts of negligence, and also as bearing upon the care of the engineer in handling and operating his engine, and as to whether he was operating it with due regard for the rights of respondent, and also as bearing upon the contributory negligence of respondent. *Christenson v. Railway* (Utah) 80 Pac. 746. And for like reasons the court did not err when stating to the jury the sub-

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stance of the complaint, this alleged act of negligence in connection with and among the other allegations of negligence.

5. Appellant also complains because the court refused to give the following request: "Therefore, if you find that the plaintiff, in going behind his dray without blocking its wheels or taking any other precautions for his own safety, or without keeping a lookout for the approach of the engine, or arranging for another person to do so, was not in the exercise of ordinary care for his own safety, and that such neglect upon his part proximately contributed to his injury, then your verdict should be for the defendant." The court fully and accurately charged the jury on the question of contributory negligence and the care to be used by respondent, and said all that was necessary to be stated to give the jury a correct understanding of the law on the subject. The court was not called upon, nor was it proper, to single out one or two isolated facts, and confine the jury to those particulars narrated, without notice of others that they might have thought important. In determining whether the respondent was guilty of contributory negligence, "the jury is bound to consider all the evidence and circumstances bearing upon the question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of others." *Railway Co. v. Ives*, 144 U. S. 433, 12 Sup. Ct. 679, 36 L. Ed. 485; *Leak v. Railway Co.*, 9 Utah, 246, 33 Pac. 1045; *Id.*, 163 U. S. 280, 16 Sup. Ct. 1020, 41 L. Ed. 160. For the reason that the court fully covered the ground of contributory negligence in its charge to the jury, and for the reason that this request was too much upon the weight of the evidence, it was not error for the court to refuse it.

6. It is also contended that the court erred in refusing to give the italicized portion of the following request: "You are further charged that the mere fact that the accident has happened is not sufficient proof to charge the defendant with negligence. The burden of proving negligence rests on the party alleging it, and when a person charges negligence on the part of another as a cause of action he must prove the negligence by a preponderance of the evidence. *And in this case, if the jury finds that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and you should find the issues for the defendant.*" From the portions of the charge already quoted, we think the substance of this request was given to the jury. It is conceded that the substance thereof was given, except the italicized portion. In addition to the charge already quoted the court said: "The burden of proof is upon the plaintiff in this case, and it is necessary, before he is entitled to a verdict at your hands, that he should establish by a preponderance of the evidence the allegations of his complaint"—stating them. The court further charged: "By a preponderance of the evidence is meant the greater weight of the evidence; that which is the more convincing as to its truth," etc. It many times has been said, and it has become settled law,

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that it is sufficient if the jury were properly instructed in substance, and that the court need not adopt the form of language presented by counsel; but it may choose that form of language which it deems best adapted to intelligently state the law to the jury on the requested subject-matter. The jury here, having been expressly and affirmatively charged that the plaintiff, before he was entitled to a verdict, must establish his case, specifically enumerating the propositions, by a preponderance of the evidence, defined to them to be the greater weight of the evidence, we cannot see how the law on this subject would have been strengthened, or the rights of appellant better guarded, by also stating the law negatively to the jury as appellant requested. Where, as here, the court charged the jury that the burden of proof is upon the plaintiff to establish his case by a preponderance of the evidence, it is not required to give a request instructing them that, if the evidence is equally balanced, they should find for the defendant. *International, etc., R. Co. v. Villareal* (Tex. Civ. App.) 82 S. W. 1063; *Harper v. State, etc.*, 101 Ind. 109.

We are cited to the case of *Wells v. Construction Co.*, 27 Utah 524, 76 Pac. 560, in support of appellant's contention. That portion of the request, "that the mere fact that the accident has happened is not sufficient proof to charge the defendant with negligence," not given in the Wells Case, and the principal point under discussion in that case, was given in the case at bar. In that particular, the cases are unlike. Further, in the case at bar the court more fully and specifically charged the jury on the questions of burden of proof and preponderance of evidence than was done in the Wells Case; and in this particular the two cases are dissimilar. In the Wells Case, in effect, it was held that the substance of the request was not contained in the charge. In the case at bar we think the substance of the request is contained in the charge. We are, however, of the opinion that the particular portion of the request (the italicized portion) here not given, and complained of, under the issues as submitted to the jury, does not correctly state the law. Such a statement of law would be correct, where the case submitted to the jury consists solely of issues upon the complaint; for then the burden of proof rests upon the plaintiff on all the issuable facts. But here there was an affirmative plea of contributory negligence, which was an issuable fact, and, as such, was submitted to the jury, upon which, under the unanimous holding of this court, the burden of proof rested upon the appellant. The language of this portion of the request is open to the construction, and therefore objectionable, that plaintiff could recover only by having every point or issue found in his favor by the greater weight of evidence. In other words, if the evidence on the issue of contributory negligence was "equally balanced," plaintiff could not recover. We think the correct rule is that where the case as submitted to the jury does not consist solely of the issues upon the complaint, but also includes

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the affirmative issues raised by the defendant, it is not error for the court to refuse like requests. *Richelieu Hotel Co. v. International, etc., Co.*, 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; 1 Blashfield on Instructions, § 349. It is true there is some force to the contention that this portion of the request relates alone to the preceding statement that the burden of proving negligence rests upon him who charged it, and, with such construction, it was not objectionable. But by the later phrase, "and in this case if the jury find," etc., they were liable to apply it to all the issuable facts, including the one of contributory negligence, and therefore it was misleading, and should not have been given. So far as the Wells Case is in conflict with the views herein expressed, it is overruled.

The judgment of the court below is therefore affirmed, with costs.

MCCARTY, J., concurs.

CHICAGO SOUTHERN RY. CO. v. NOLIN.

(Supreme Court of Illinois, April 17, 1906.

[77 N. E. Rep. 435.]

Eminent Domain—Railroads—Right of Way—Elements of Damage.*—In proceedings to condemn land for a railroad right of way through a stock farm, the jury may consider the increase in the risk of loss to the owner from fire and the increased damage to live stock, if any, only so far as it effects a depreciation in the market value of the land not taken; damage to stock or from loss by fire which may result from the negligence of the railroad being too remote to be considered in such proceedings.

Trial—Instructions—Refusal of Request.—It is not error for the court to refuse a request to charge substantially covered by instructions given.

Appeal from Iroquois County Court; Frank Harry, Judge.

Proceedings by the Chicago Southern Railway Company against William T. Nolin to condemn a right of way over defendant's farm. From a judgment authorizing plaintiff to take possession of the strip of land required on payment to defendant of respective sums awarded by the verdict of a jury, the railroad company appeals. Affirmed.

Appellant, the Chicago Southern Railway Company, filed a petition in the county court of Iroquois county for condemnation of a strip of land across the farm of William T. Nolin, the appellee, which is situated in Iroquois county. The strip extends north and south through the farm. The south 950.7 feet of the

*For the authorities in this series on the question whether danger to property not taken from fires set by locomotives may be element of damages in condemnation proceedings by a railroad, see foot-note appended to *Illinois, etc., Ry. Co. v. Ring* (Ill.), 19 R. R. R. 675, 42 Am. & Eng. R. Cas., N. S., 675.

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strip is 200 feet in width and the balance is 100 feet in width. Nolin filed a cross-petition, praying that damages to the balance of the farm, caused by the location, construction, and operation of the railroad, be ascertained and awarded to him in said proceeding. A trial was had before a jury, and a verdict returned awarding Nolin \$1,527.63 as compensation for the land proposed to be taken and \$5,000 as damages to the balance of the farm. The court entered an order and judgment authorizing the railway company to take possession of the strip of land described in its petition upon payment to Nolin of the respective sums awarded to him by the verdict of the jury. The railway company appeals to this court.

The farm of appellee consists of 348 acres in a compact body. The proposed right of way extends through the middle of the farm, leaving approximately 163 acres on the east side thereof and 174 acres on the west side. The right of way itself takes 11.751 acres. The farm has been used for a number of years by Nolin for raising registered stock and is well adapted for that purpose. Sugar creek, which supplies water for stock purposes, runs across the southeast corner of the farm, but does not touch any of the land west of the proposed right of way, and there is no water for stock on that side. Numerous frame buildings are located on the farm. On the right of way are a large corncrib, with a capacity of over 10,000 bushels of grain, a covered feed rack and a scalehouse. It was agreed upon the trial that the jury should award \$500 as damages to the land not taken on account of the expense of removing these buildings from the right of way, and by stipulation it was agreed that Nolin should retain the ownership of these buildings, and should have until June 10, 1905, to remove them from the right of way. Commencing 125 feet east of the right of way and extending east for a distance of about 500 feet are numerous frame buildings, consisting of a sheep barn, horse barn, cattle barn, granary, buggy shed, toolhouse, residence, smokehouse, hoghouse, and poultry houses. The barns, sheds, and granary are connected with feed lots. The feed lot surrounding the cow barn contains a grove, consisting of about 160 walnut, oak, wild cherry, and locust trees. These trees furnish shade and protection for the stock. The right of way takes part of this feed lot and about 70 of the trees. Two houses for tenants are on other parts of the farm; one being about 250 feet west of the right of way and the other in the northeast corner of the farm.

The petitioner stipulated that it would construct two farm crossings on its right of way on the farm at two designated points; that it would extend certain tiling, which terminates west of its right of way, so that water emptied from the tile would not be obstructed by the right of way; that it would construct a bridge over Sugar creek immediately south of Nolin's farm, with such spans as may be required by law in order not to unnecessarily impair the usefulness of the stream,

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and that it would erect a legal fence on each side of the strip as soon as rails were laid on the right of way.

The jury viewed the premises before returning their verdict.

It was stipulated before trial that the fair cash market value of the land taken is \$130 per acre, amounting in the aggregate to \$1,527.63, which is the amount awarded therefor by the jury. The only controversy in the case relates to the damages to the remainder of the farm.

Appellant assigns as error the action of the trial court in refusing to exclude the testimony of certain witnesses for appellee, the giving of appellee's fourth and ninth instructions, and the refusal to give appellant's first, second, and third instructions.

J. L. O'Donnell, T. F. Donovan, and Morris & Hooper (Montgomery & Hart, of counsel), for appellant.

Dyer & Wallbridge and *O. F. Morgan*, for appellee.

Scorr, J. (after stating the facts). At the close of all the evidence in the case the petitioner moved the court to exclude from the consideration of the jury the testimony of one Lockhart, a witness who testified on behalf of Nolin as to the damages to lands not taken, for the reason that he included in his estimate improper elements of damages. The motion was denied. The same motion was made as to the testimony of other witnesses who testified on Nolin's behalf. Petitioner here contends that it was error to overrule these motions. These witnesses, after testifying on their direct examination to an amount that the portion of the farm not taken would be depreciated in value by the taking of the strip for railroad purposes, in answer to questions propounded on cross-examination, stated that in fixing such amount they had taken into consideration, among other things, the increased danger from fire and the danger to live stock from the operation of the proposed railroad.

It is also urged that the court erred in giving to the jury the defendant's fourth instruction, which told the jury that the measure of damages to the lands not taken would be "the difference in their fair cash market value before the construction of the road and after its construction," and that in fixing such damages, if any, the jury might take into consideration, among other things, the danger to live stock and the danger of the escape of fire attendant upon the operation of the railroad, in so far as it appeared from the evidence and the view of the premises that such dangers, or either of them, would depreciate the fair cash market value of lands not taken. The objection urged to this instruction and to the evidence mentioned above is that both included improper elements, namely, the danger to live stock and the increased risk of loss from fire.

It has been often decided by this court that the only question for the determination of the jury, so far as land not taken is concerned, is the amount, if any, of its depreciation in market value, and, if the danger of loss from fire or the danger of loss by the killing or injury of live stock in fact depreciates the

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value of land not taken, such dangers, singly, together, or in connection with other like matters, afford a proper basis upon which a witness may estimate damages, and are proper elements to be considered by the jury in determining whether the land not taken will actually be depreciated in market value, and, if so, to what extent. In the case of *Chicago, Peoria & St. Louis Railway Co. v. Greiney*, 137 Ill. 628, it is said at page 633, 25 N. E. 798, at page 799: "The recovery can only be for the depreciation in the market value of the land not taken, and the jury were expressly told, in an instruction given at the instance of appellant, that they were 'not authorized by law to allow anything, by their verdict, by reason of any supposed damage to stock from the use of said right of way for railroad purposes, or for damage to the person of the landowner or any member of his family, or the damage to stock by reason of the taking and subsequent using of said right of way; that the law considers the probable damage to stock or to the family of the landowner as too remote and speculative to be considered in estimating the just compensation to be paid for such right of way.' A depreciation in the market value of the land is quite a different thing, and whether that is because of the inconvenient shape of fields, nonaccess from one part to another caused by the building of the road, or from injuries anticipated to property from its operation, the result is the same, and is solely because of the building and operating of the road, and therefore to be compensated for by the appellant. The material inquiry is the fact of depreciation in market value, but it is within the province of the jury to inquire whether the facts thus recited exist, and, if they exist, whether they cause a depreciation, and, if any, its extent, in the market value." That the jury may consider whether or not the danger of fire from passing engines will depreciate the value of land not taken has been expressly held to be the law in each of the following additional cases: *Keithsburg & Eastern Railroad Co. v. Henry*, 79 Ill. 290; *Chicago, Paducah & Memphis Railroad Co. v. Atterbury*, 156 Ill. 281, 40 N. E. 862; *Illinois, Iowa & Minnesota Railway Co. v. Ring*, 219 Ill. 91, 76 N. E. 83. These authorities conclusively settle the question in this state.

On the other hand, the law is, and it is proper to instruct the jury, that the railroad company is bound to use the best engines, equipped with the most improved appliances to prevent the escape of fire and consequent damage or loss resulting therefrom, and that for negligence in that regard the company would thereafter be responsible, and the jury should not consider any loss or damage that may arise from such negligence in arriving at a verdict (*Jones v. Chicago & Iowa Railroad Co.*, 68 Ill. 380; *Chicago, Peoria & St. Louis Railway Co. v. Greiney*, *supra*; *Chicago, Peoria & St. Louis Railway Co. v. Eaton*, 136 Ill. 9, 26 N. E. 575; *Illinois, Iowa & Minnesota Railway Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444), and in the case at bar an instruction to this effect was given by the court at the request of the petitioner. The distinction is this: It is proper for the

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jury to consider the increased risk of loss from fire and the increased danger to live stock if, and in so far as, the market value of land not taken is thereby depreciated; but it is not proper for the jury to anticipate damages of any character which may, but will not certainly, result from the operation of the railroad and allow anything by their verdict for such anticipated damages. Damages which may in the future follow upon the happening of some possible, but uncertain, event, are not for their consideration. Whether the value of the land not taken will be depreciated in the market by increased danger from fire or by increased danger to live stock is for their consideration.

It follows that the motions to strike out the testimony were properly overruled, and that there was no error in giving the fourth instruction.

The same objections as are urged to defendant's fourth instruction are urged to his ninth instruction, and, in addition, it is said that by the ninth the jury were authorized to base their judgment in reference to the amount of the depreciation in the market value of the land not taken upon a consideration of the ordinary and usual manner of the operation of the road, and it is said that this left it to the jury to determine what would be the ordinary and usual manner of the operation of this road. We think this objection without merit. The jury, from their general knowledge, would know the ordinary and usual manner of operating railroads in this state, so far as material in this cause, and it was proper to instruct them on the basis that they possessed such knowledge.

Complaint is made of the refusal of the first and second instructions asked by petitioner. Each stated an accurate proposition of law and might well have been given. The substance of the first, however, is contained in the twentieth instruction given at the request of the petitioner, while the proposition embodied in the second is also found in the twenty-third instruction given at the request of the petitioner.

We think petitioner's third instruction was properly refused, for the reason that it might have led the jury to disregard the effect, if any, of the danger to live stock from passing trains, on the market value of defendant's lands not taken.

The judgment of the county court will be affirmed.

Judgment affirmed.

WHEELING & E. G. R. CO. v. TOWN OF TRIADELPHIA *et al.*

(Supreme Court of Appeals of West Virginia, Dec. 12, 1905.)

[52 S. E. Rep. 499.]

Street Railroads—Grant by Municipal Authorities—Effect.*—An ordinance, passed by the council of a town, granting to a street railway company the right to lay its track and operate its railway in the streets of the town, and accepted by the railway company, constitutes a contract between the town and such company, vesting title to such right or easement in it, unless the ordinance contains conditions precedent compliance with which is requisite to the vesting of title.

Same—Forfeiture of Right.†—Such right may be forfeited and lost by failure to comply with subsequent conditions, and, if the ordinance expressly provides for forfeiture as the penalty of noncompliance with conditions specified in it, substantial performance of the contract as a whole constitutes no answer to a proceeding to forfeit for failure to comply with such conditions, however slight their relative importance may be. The question of materiality is, in such case, withdrawn from the courts by stipulations of the contract.

Same—Conditions—Nonperformance.†—A street railway license or privilege in a street may be forfeited for failure to lay planks of prescribed dimensions along the rails of its track in front of improved property, if the ordinance expressly gives the right to forfeit it for such cause.

*For the authorities in this series relating to the point covered by the first headnote of the principal case, see foot-notes appended to *Virginia P. & P. Co. v. Commonwealth* (Va.), 18 R. R. R. 135, 41 Am. & Eng. R. Cas., N. S., 135; *Newport News & O. P. Ry. & Elec. Co. v. Hampton Roads Ry. & Elec. Co.* (Va.), 12 R. R. R. 543, 35 Am. & Eng. R. Cas., N. S., 543 (company had no vested rights preventing city from granting to another street railway the right to put down a double-track car line on the street, where city had been merely granted permission to lay a double track on the street, and, instead of taking advantage of the permission, had used only a single track); *Commonwealth v. Uwchlan St. Ry. Co.* (Pa.), 5 R. R. R. 376, 28 Am. & Eng. R. Cas., N. S., 376 (charter providing for construction of railway on street in which another company had acquired exclusive privilege was invalid); *City of Reading v. United Traction Co.* (Pa.), 4 R. R. R. 625, 27 Am. & Eng. R. Cas., N. S., 625 (contract rights of company was not impaired by act of city in requiring it to pave street with different material from that specified by ordinance granting franchise); *Logansport R. Co. v. City of Logansport* (Ind.), 3 R. R. R. 559, 26 Am. & Eng. R. Cas., N. S., 559; foot-notes appended to *McHugh v. St. Louis Transit Co.* (Mo.), 17 R. R. R. 349, 40 Am. & Eng. R. Cas., N. S., 349; foot-notes appended to *Sluder v. St. Louis Transit Co.* (Mo.), 16 R. R. R. 293, 39 Am. & Eng. R. Cas., N. S., 293.

†For the authorities in this series on the subject of forfeiture of right to use streets for street railway purposes, see note, 17 Am. & Eng. R. Cas., N. S., 622; *Millcreek Tp. v. Erie Rapid Transit St. Ry. Co.* (Pa.), 13 R. R. R. 36, 36 Am. & Eng. R. Cas., N. S., 36 (forfeiture for failure to build road in time designated); *Newport News & O. P. Ry. & Elec. Co. v. Hampton Roads Ry. & Elec. Co.* (Va.), 12 R. R. R. 543, 35 Am. & Eng. R. Cas., N. S., 543 (waiver of forfeiture not the granting of new privilege); *Cedar Rapids & M. City Ry. Co. v. City of Cedar Rapids* (Iowa), 5 R. R. R. 745, 28 Am. & Eng. R. Cas., N. S., 745 (city not deprived of right to repeal ordinance authorizing construction of street railway, by colorable action of company in commencing construction); *State v. Latrobe* (Md.), 1 Am. & Eng. R. Cas., N. S., 118 (forfeiture of municipal grant for non-compliance with conditions with respect to time of completion of road).

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Equity—Relief against Forfeiture.—Equity will relieve from forfeitures for nonperformance of covenants other than those for the payment of money, arising out of accident, mistake, or surprise, and in the absence of willful and deliberate refusal to perform when no pecuniary injury has resulted to the covenantee and the wrong done is easily remediable; but such power of relief is discretionary, and will not be exercised unless the delinquent covenantor is able and willing to immediately perform the covenant.

Same—Enforcement of Forfeiture.—Equity will not permit the enforcement of a forfeiture in an inequitable and oppressive manner, nor a perversion thereof to purposes other than those for which the power of forfeiture has been reserved.

Same—Oppressive Conduct.—In the exercise of such power, under an ordinance of a municipal corporation prescribing notice and specification of cause as a necessary preliminary step, the officers of such corporation must deal fairly, openly, and frankly with the party whose rights they attempt to take away, and abstain from such conduct as will work a surprise upon him. Their conduct is governed by substantially the same rules and principles as apply to proceedings by private persons under similar circumstances. In order to be inequitable and oppressive, their conduct need not be actually fraudulent. If in equity and conscience it is oppressive or lacking in fairness, equity will relieve, however honest and sincere the parties attempting to forfeit may have been.

Appeal—Review—Discretion of Court.—The discretion of the court in such case is a sound legal discretion, subject to review, and the appellate court will reverse the action of the trial court when, in its opinion, relief has been improperly denied.

Street Railroads—Use of Streets—Forfeiture of Right—Relief.—A declaration of forfeiture of a street railway privilege in a street by the council of a town, effected by repeal of the ordinance by which the privilege was granted, pursuant to a reservation of power so to do, for cause and after notice, has not the force and effect of a judicial determination of the existence of cause for forfeiture, and does not preclude a resort to the courts by the railway company for vindication of its rights. After such repeal, pursuant to notice, the railway company may, by injunction, prevent the town authorities from removing or disturbing its track, if no cause of forfeiture existed, or the circumstances shown are such as to call for the exercise of equity jurisdiction to relieve from forfeiture. In so far as the decision in *Town of Davis v. Davis*, 21 S. E. 906, 40 W. Va. 464, imports the contrary of the foregoing proposition, it is re-examined and disapproved.

Municipal Corporations—Privileges in Highways—Police Power.—The action of municipal authorities in granting and revoking privileges and licenses in highways is the exercise of delegated police power, and is not judicial in character.

Certiorari—Actions Reviewable.—Only judicial action is reviewable by the writ of certiorari under sections 2 and 3 of chapter 110 of the Code of 1899. The scope of the writ is not altered by the statute in respect to the nature of the proceedings for the review of which it may be had. In this respect it remains as it was by the common law.

Street Railroads—Construction—Consent of Municipal Authorities.—Consent of the board of commissioners of Ohio county to the operation of a street railway on and over the Cumberland Road in said county of Ohio does not confer authority upon the railway company holding such permit to construct and operate its railway on and over such portion of said road as lies within the limits of the town of Triadelphia, in said county, without the consent of the authorities of said town.

(Syllabus by the Court.)

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Appeal from Circuit Court, Ohio County.

Bill by the Wheeling & Elm Grove Railroad Company against the town of Triadelphia and others. Decree for defendants, and plaintiff appeals. Reversed.

Rehearing denied January 9, 1906.

Henry M. Russell and Howard & Handlan, for appellant.

Alfred Caldwell and Nelson C. Hubbard, for appellees.

POFFENBARGER, J. The council of the town of Triadelphia, in Ohio county, having repealed the ordinance under which the Wheeling & Elm Grove Railroad Company had been operating its street railway in said town, and caused a part of its track to be taken up, said railroad company obtained a temporary injunction, inhibiting the town, its officers, and agents from interfering with its road. Thereupon the town answered the bill, alleging forfeiture of the privileges granted by the ordinance, because of failure and refusal to observe and perform conditions, and praying, by way of affirmative relief, that the railroad company be enjoined and restrained from further operating its road in said town and compelled to remove from the streets thereof its poles, wires, rails, ties, etc., and restore the street and a certain bridge, mentioned in the bill, to the condition in which they were before the construction of the road, unless the consent of the town to the further occupation and use of the street for the purpose aforesaid should be obtained. On the hearing, the injunction was dissolved and the cross-relief asked for by the town granted. From this decree said company has appealed.

The ordinance was passed on the 31st day of March, 1896, granting to the Wheeling Suburban Railway Company, its successors and assigns, the privileges now in question, and that company subsequently assigned the same to said Wheeling & Elm Grove Railway Company. Under it, the road was constructed within the time required. The forfeiture is not for nonuser of the franchise or privilege, but for failure to comply with certain conditions imposed by section 4 of the ordinance in the following clauses thereof: "Said railway company shall so construct its tracks upon the roads or streets hereinbefore mentioned that at any place any of its tracks may cross any road or street within said town, the said railway company shall at every such place lay its track or tracks on a level with the surface or plane of said road or street at the place of such crossing and shall pave with white oak planks not less than two inches thick between all its rails crossing such road or street and shall at all times hereafter keep and maintain the said paving or planking in good order and repair to the satisfaction of the council of said town. Said company shall also lay and maintain a white oak plank two inches thick and eight inches wide on each side of each rail along its track in front of all improved property." To enforce compliance with these conditions and others inserted in the ordinance, section 15 of that instrument provided as follows: "Should the

Wheeling Suburban Railway Company fail to fulfill and perform the conditions of this ordinance or comply with the requirements thereof upon them, or do those things they are by this ordinance prohibited from doing, the said town may give said Wheeling Suburban Railway Company notice of its intention to repeal this ordinance and revoke and annul all the rights, powers and privileges by this ordinance given by said town to said Wheeling Suburban Railway Company, and stating in such notice in what respect said Wheeling Suburban Railway Company have failed to fulfill and perform the conditions of this ordinance or to comply with the requirements thereof upon them, or wherein they have done any of those things they are by this ordinance prohibited from doing. At any time after three months from the service of such notice upon the president or secretary of said Wheeling Suburban Railway Company the council of said town may repeal this ordinance and revoke and annul the rights, powers and privileges by this ordinance given by said town to said Wheeling Suburban Railway Company; provided, however, that if the said Wheeling Suburban Railway Company before such repeal and revocation and annulling shall fulfill and perform the condition or conditions of this ordinance said notice alleges they have failed to fulfill and perform, and shall comply with the requirement or requirements of this ordinance said notice alleges they have failed to comply with, and shall cease at once on receipt of said notice to do any of those things that they are prohibited from doing by this ordinance which said notice states they have been doing, said council shall not have the power to repeal and revoke and annul the rights, powers and privileges thereby given by said town to said Wheeling Suburban Railway Company." Notice dated August 28, 1901, specifying, as breaches of conditions, elevation of the tracks above the level of the streets at the crossings of Monroe street and Clay street, failure in part to pave the crossing at Clay street, and failure to lay planks along the rails in front of lots 24 to 33, inclusive, except a short strip at the corner of lot 30, was served upon the railway company. Just a few days before the expiration of three months from the date of service of said notice, said company caused its track to be lowered at the crossings and some plank to be put down at the places specified in the notice, but the plank pavement at the street crossing did not extend entirely across the street, and the planks laid along the tracks in front of improved property were not of the width required by the ordinance. Many of them were only five inches wide and, in one place, for a distance of about 90 feet none at all was put down, and the crossing at Monroe street was left too high by about five inches. On the 7th day of December, 1901, more than three months after the date of the service of the notice, the council of the town repealed the ordinance, reciting in the repealing ordinance the giving of the notice and noncompliance with its requirements. The failure to comply strictly with the requirements of the ordinance is not denied by the railway company, but it claims to

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have substantially complied with them, and also that, prior to the repealing of the ordinance, its agents applied to officials of the town to know whether there was any objection to the manner in which the work had been done, and expressed a willingness to remedy any defects in it which might be suggested, and no objection was made. But this seems to have occurred after the repeal of the ordinance. The railway company's own witness says it was afterward.

In addition to its defense of substantial compliance, the railway company relies upon certain ordinances adopted by the commissioners of Ohio county, granting to it the privilege of operating its railway on and over certain portions of what is known as the Cumberland Road, including that portion thereof which runs through the town of Triadelphia, and on which said railway is located through said town. This road was originally constructed and owned by the government of the United States. In 1835, the government ceded to the several states through which said road was located the care and control of the portions thereof lying respectively within said states, reserving to itself certain rights in them. By this compact it relieved itself of the burden of maintaining said road and cast it upon the states, but it retained the right to use the same free of charge for any governmental purpose. *Searight v. Stokes*, 3 How. 151, 11 L. Ed. 537; *Neil v. Ohio*, 3 How. 720, 11 L. Ed. 800; *Achison v. Huddleson*, 12 How. 293, 13 L. Ed. 993. Upon the formation of the state of West Virginia, that portion of said road lying within this state passed under its control, and, by statute, the management thereof was intrusted to the board of public works of the state. By an act of the Legislature, passed on the 13th day of February, 1890, the care and control of so much of said road as lies within the county of Ohio, together with all the rights, powers, and duties in relation thereto, belonging to the board of public works of this state under existing laws, including power to collect tolls on said road, was committed to the board of commissioners of said county, as soon as said board should pass an ordinance agreeing to accept the trust. Soon afterwards, such ordinance was passed. It is contended now that the town of Triadelphia has no control of that part of said road which lies within its limits, and that the railway company is entitled to the use and occupation thereof, for the purposes of its road, under the ordinances passed by said board of commissioners. On the other hand, it is urged that the act of the Legislature of Virginia, passed on the 4th day of February, 1840, incorporating the town of Triadelphia, lying on both sides of said road, and conferring upon it, among other things, the power "to regulate and graduate the streets and alleys, and to pave the same if deemed necessary," vested in said town all the right and title to, and power over, so much of said road as lies within its territory that the state of Virginia then had. Counsel for the appellees rely also upon section 5 of article 11 of the Constitution of this state, which provides that: "No law shall be passed by the Legislature

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granting the right to construct and operate a street railroad within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street and highway proposed to be occupied by such street railroad." The status of so much of the national road as lies within the territory of the town of Triadelphia depends upon the statutory provisions. Chapter 56 of the Code, concerning the board of public works and tolls on the Cumberland Road and other turnpikes, provides for the maintenance of said road and turnpikes, by means of the exaction of tolls, and this, as to said Cumberland Road, was done by the board of public works of the state, until its care and control were transferred to Ohio county by the act hereinbefore mentioned. Section 21 of chapter 39 of the Code provides that the interest which belonged to the state on the 1st day of July, 1868, in any road or bridge or public landing lying wholly or in part within the limits of any county is transferred to and shall continue vested in such county, so far as such road, bridge, or public landing is within the said county. But the Cumberland Road is expressly excepted from the operation of said section. Section 31 of chapter 43 of the Code of 1899 says: "The roads, bridges and public landings transferred by the state to the several counties in which they are situated shall hereafter be regarded as county roads, bridges and landings." Section 28 of chapter 47, relating to cities, towns, or villages, says: "The council of such city, town or village shall have power therein to lay off, vacate, close, open, alter, curb, pave and keep in good repair, roads, streets, alleys, sidewalks, crosswalks, drains and gutters, for the use of the public, or any of the citizens thereof, and to improve and light the same, and have them kept free from obstructions on or over them." Section 33 of chapter 43 of the Code of 1899, provides that no road or landing shall be established by the county court of a county upon or through any lot in any incorporated village, town, or city without the consent of the council thereof.

Aside from the question of title to the fee in public roads lying within incorporated cities and towns, courts everywhere incline to the view that such corporations have certain rights and powers respecting such public roads. When there are no express statutory provisions limiting the powers of the county authorities over such portions of the public roads, and the General Statute or the charters of cities and towns confer power to lay out, open, and regulate streets, alleys, and walks, portions of the road lying within the city or town are generally held to be under the control of the authorities thereof so far as to enable them to keep the same free from obstruction and in good condition and order by improving them. *State v. City of New Brunswick*, 30 N. J. Law, 395; *Quinn v. Patterson*, 27 N. J. Law, 35; *State v. Passaic Turnpike Co.*, 27 N. J. Law, 217; *State v. Jersey City*, 26 N. J. Law, 444. These are cases of turnpikes and plank roads owned by private corporations. *Dillon on Municipal Corporations* (4th Ed.) par. 676, says: "Throughout the United States, township,

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county, or other local authorities have the general control and supervision over the ordinary public highway, while in incorporated towns and cities this power, as respects streets, is usually conferred upon the corporate authorities. When the jurisdiction and power in the one is excluded by the charters of the other has given rise to nice and difficult questions of construction, depending upon the supposed intention of the Legislature, to be gathered from the whole course of legislation on the subject in the particular state, and with reference to the particular municipality." At section 677 the same work says: "So, by statute in Texas, the counties had a general authority to keep in repair the public highways therein, and an incorporated town, by its charter, had the right to improve its streets and alleys; and the question arose whether the county or town authorities had power to keep in repair streets or highways within the corporate limits of the town. The court, to prevent conflict of jurisdiction, held that the town had exclusive control of the streets and highways therein. So it is held in Indiana, that the General Statutes of the state in relation to 'public highways' do not apply to the streets and alleys of an incorporated town or city." In *Norwich v. Story*, 25 Conn. 44, such provisions in the charter of a city, read in connection with the general laws conferring powers upon the county authorities, were held to give concurrent jurisdiction over the highway within the city to city and county authorities.

The status of the Cumberland Road seems to be somewhat different from that of the ordinary county road. The Legislature has dealt with it in a manner different from that in which it has dealt with other roads. Whether the law contemplated its maintenance throughout from tolls, until its transfer to the authorities of Ohio county, is not clearly indicated. It would seem, however, that in order to effectuate the purpose of its maintenance, the Legislature must have necessarily retained the power of maintenance through the corporation situated on it. No express authority is conferred upon them to close or alter it, nor is any duty laid upon them to maintain it according to any particular standard. Hence, if the state did not retain the power to keep it up, the portions lying within the town might have become, or might yet become, so dilapidated and out of repair as to render the whole road practically useless. Before the cession of the road to the state, the government expended upon it large amounts of money, and stipulated for the use of the road for governmental purposes, without liability for future expenses or cost of keeping it in repair. By allowing the road or any part of it to fall into decay, the state might become guilty of recreancy to the trust confided in it by the national government. On the other hand, as the towns have the power to make, construct, and keep in repair their roads and streets, it seems reasonable to say, they might improve, repair, and maintain such portions of said road as lie within their territories. This is not at all inconsistent with the rights of the state or county. Though not having full and complete control so as to enable them to impair the efficiency of

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the road as a state road, they might well have the right and power, consistently with the interests of the state, to aid in keeping it in repair and to add to the work done by the state such additional work and expense as their authorities might deem expedient in order to put such portions of it in a higher and better state of repair and condition than other portions thereof. As to additional burdens upon the road, a reasonable view would be that the state, without the consent of the authorities of the town, would have no right or power to place upon that portion of it lying within the town anything in the nature of an obstruction or additional burden. The town, when incorporated, accepted the road as a part of its territory without any such burden, and the Constitution withholds from the Legislature power to grant the right to construct a street railroad within any city or incorporated village, without the consent of its authorities. And the state may have the power to say, on the other hand, that the town shall not impair the efficiency and usefulness of its road by authorizing the construction of a street railway upon it. The statutes and constitutional provisions must be harmonized, if possible, so that all may have effect. By giving this community of interest in so much of the road as lies within the town, repugnancy is avoided, and the rights of both the state and the town protected. Part of the Cumberland Road was taken into the town by express legislative authority. The town accepted it as a part of its territory in its then condition. No change occurred in it prior to the adoption of the present Constitution, and that instrument denies to the Legislature the power to authorize the invasion of any town by a street railroad without its consent. As the Legislature has no power to do this in any case, it could not authorize the board of commissioners of Ohio county to grant such a privilege within the town. In view of this situation, the respective rights of the town, and of the state or Ohio county, the Wheeling Suburban Railway Company took the precaution to obtain grants of privileges in that part of the road lying within the town of Triadelphia from both the board of commissioners and the council of said town. Whether, as to that portion of the road, it was necessary to have authority from said board of commissioners, it is not necessary to decide, but we are clearly of the opinion that it was necessary to have authority to use it from the council of the town of Triadelphia. The grant from the town of permission to use said Cumberland Road and continuance thereof being conditions precedent to its rights to use it, two questions arise: First. Assuming that there has been no forfeiture of the franchise granted, has the railway company sought the proper remedy for the vindication of its rights? The council of the town, by repealing the ordinance, has declared a forfeiture. What is the effect of that action? What is the character of the function performed in declaring the forfeiture? Is it legislative, executive, or judicial? Second. Does the admitted failure of the railway company to comply with the con-

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ditions mentioned operate a forfeiture, independently of the force and effect of the repeal of the ordinance?

No objection to the jurisdiction in equity or the remedy invoked has been raised by counsel. Both sides ask an adjudication upon the merits. But it has been suggested here, in consultation, that the action of the council in repealing the ordinance is judicial and is binding upon the parties until reversed by some appellate procedure, in consequence of which resort cannot be had to a court of equity as to any matter involved in, or governed by, this action of the council. If this be true, the remedy is certiorari, under the statute. Section 2, c. 110, Code 1899. But is it true? This depends upon the nature of the proceeding, as well as the nature and scope of the remedy by certiorari. That writ is an extraordinary common-law remedy, except in so far as it has been altered by statute. Originally, it could be invoked only to review judicial proceedings, and to correct errors of law apparent on admitted and established facts. 4 Enc. Pl. & Pr. 11. "The office of a writ of certiorari is to bring to a superior court for review the record and proceedings of an inferior court, an officer, or a tribunal exercising judicial functions, to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained, and errors, if any, corrected. It is not essential, however, that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice, but it is sufficient if they are quasi judicial. It is enough if they act judicially in making their decision, whatever may be their public character." 6 Cyc. 750; *Poe v. Machine Works*, 24 W. Va. 517. Our statute (sections 2, 3, c. 110, Code 1899) concerning the remedy by certiorari is broad in its language, and, upon a hasty reading thereof, would seem to import that the writ is applicable to all proceedings before county courts, municipal councils, justices, and other tribunals; but a careful examination of it leads to the conclusion that it does not broaden the scope of the writ as to the class of cases to which it applies. It says the writ shall lie in every case, matter, or proceeding before a county court, council, a city, town, or village, justice, or other inferior tribunal, in which there has been a judgment or final order, or a judgment or order abridging the freedom of a person. What is the meaning of the words "every case, matter or proceeding"? Are they to be taken literally? Why did the Legislature use these terms? A very good reason is that proceedings reviewable by writ of certiorari are such in their very nature as can be described only by the use of general terms. They are proceedings not according to the course of the common law, but anomalous proceedings, various in number and unusual in kind. Common-law proceedings are embraced under the designations of the forms of action, such as assumpsit, debt, covenant, trespass, trespass on the case, ejectment, and others. For all these, the writ of error is the process for review. In chancery causes the remedy is by appeal. But proceedings which do not fall within these classes

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of cases are indefinable by nature and must be referred to in general terms. This difficulty was experienced by the Legislature, and the section under consideration bears evidence of it on its face, in the description of the classes of cases to which certiorari was applicable before the passage of that statute. It says: "In every case, matter or proceeding in which certiorari might be issued as the law heretofore has been." Those were cases to which common-law certiorari was applicable, and they are described in the exact language of the new statute. Prior to the passage of chapter 153, pp. 487, 488, §§ 2, 3, Acts 1882, the present statute, we had no similar one on the subject, and the writ had only its common-law force. This statute had other purposes than an increase in the classes to which the writ might apply. Prior to its enactment this mode of review was exercised before final judgment. This, the statute cut off by saying the judgment or order must be final, unless it is one abridging the freedom of a person. It limited the right to review in civil cases before justices to those in which the amount in controversy, exclusive of interest and costs, exceed \$15. Prior to the passage of any statute on the subject, the reviewing court could only consider questions of law, such as want of jurisdiction in the inferior court and deviations from the law in pronouncing judgment upon admitted or established facts disclosed by the record. It would not determine questions of fact nor consider the evidence. This statute provides that, upon the hearing, the circuit court, in addition to determining such questions as might have been determined as the law was before its passage, shall review the judgment, order, or proceeding of the inferior court or tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require. No decision of this court has ever construed the statute as giving the right to review by certiorari as to cases, matters, or proceedings nonjudicial in their nature. It goes to a county court in cases of election contests. *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770; *Burke v. Supervisors*, 4 W. Va. 371; *Dryden v. Swinburn*, 15 W. Va. 234; *State ex rel. v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343. But these are all adversary proceedings involving the exercise of judicial functions. They involve the rights of parties in respect to matters distinct from the exercise of legislative or police power. In *Brazie v. Commissioners*, 25 W. Va. 213, the duties of election canvassing boards are declared to be quasi judicial. Tested by that decision, the use of certiorari to review such proceedings is within the limits of judicial powers. In *Board of Education v. Hopkins*, 19 W. Va. 84, this writ was given to review the action of a county court upon a sheriff's settlement respecting an allowance of commissions to him. It was a matter of controversy between the sheriff and a board of education of the county, and the county court had jurisdiction to the extent of power to adjudge a settlement *prima facie* correct, but not conclusive. This also,

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as to the sheriff, was a matter of private right, the determination whereof required the exercise of judicial power. The judgment of the county court, for the time being, gave or withheld commissions claimed by him. It also made evidence for or against him, to be used in any other proceeding for the final and ultimate determination of his rights. The line of discrimination between judicial and nonjudicial functions is sometimes difficult to trace; but it is not difficult to see that the matters above mentioned stand upon a very different footing from many others, in which a municipal board or other tribunal, in the exercise of its legislative or police power, deals with the rights of the citizen who has no official connection with that body, such as a claim to office or a right to commissions. There is no suggestion by the court in any of these cases that the action reviewed is not judicial or that the writ lies to review nonjudicial actions. *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906, presents a different and anomalous illustration of the writ, holding it to be appropriate to review the action of a town council in declaring a certain thing a nuisance and abating it as such; but the court was careful there to say the act was judicial. Whether this was a correct determination does not affect the question now under consideration. Consistently with the view here advanced, the court treated the act as a judicial one and proceeded accordingly.

Whether the council of a municipal corporation acts judicially in ascertaining whether there is cause of forfeiture of a right in a street granted by it to a railway company is a more difficult question. As above stated, the distinctions between legislative or ministerial functions and judicial functions is difficult to point out. What is a judicial function does not depend solely upon the mental operation by which it is performed or the importance of the act. In solving this question, due regard must be had to the organic law of the state and the division of powers of government. In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within that subdivision of the sovereign power which belongs to the judiciary, or, at least, which does not belong to the legislative or executive department. If the matter, in respect to which it is exercised, belongs to either of the two last-named departments of government, it is not judicial. As to what is judicial and what is not seems to be better indicated by the nature of a thing, than its definition. It is necessary to the proper and effective exercise of the police power of a state or community that it be free from restraint by the judiciary. It is at variance with the very nature of such power that the officers and tribunals intrusted with its exercise must stop at every step and take those proceedings which are requisite to the due exercise of judicial power. The health of the people, the good order of the community, and the due exer-

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cise of the power demand that the officers and tribunals intrusted with its exercise be free from such restraint. It may remove, destroy, and abate, without waiting for any judicial determination, and leave the party to his right of appeal to the courts, by an action for damages, for a determination of the question as to whether the thing abated was a nuisance, or protected by a contract, unless the abatement will result in irreparable injury and thereby give equity jurisdiction by injunction. In the case of a contested election, or the settlement of the accounts of an officer and allowance of his commission, no such public necessity exists. Pending these controversies, the public service goes on unaffected by them and unimpeded. Not so in the case of obstructions to streets and highways and the existence of offensive, unwholesome, and dangerous things constituting nuisances. The public service cannot wait upon tedious long drawn out judicial investigations.

It would be difficult to enumerate all of the subjects belonging to the police power of a state or municipality, but that it does include the abatement of nuisances, the opening, construction, and repair of roads and bridges, and the lighting of streets is beyond question. 22 Am. & Eng. Enc. Law, 927, 29, 30. That the establishment, control, and regulation of roads, bridges, and streets belong to the police power of the state is nowhere asserted more emphatically and plainly than by this court. In *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747, it decided that private citizens, having no special property or interest to be affected, could not by certiorari review the trial or action of the county court in proceeding to alter the location of and rebuild a county bridge. Up until that time, these citizens had not made themselves parties to the proceeding. Afterwards, they did attempt to make themselves parties, and to appeal from the action of the county court, and this court prohibited the circuit court from entertaining the appeal by its writ of prohibition, for want of jurisdiction. *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488. Judge Brannon, in delivering the opinion, said: "We think it essential to the public interests, as involved in the execution by county courts of the important functions assigned them by law touching roads and bridges, that we should decide, as we now do, that citizens and taxpayers, merely because they are such, who have no special property or interests affected thereby, cannot become parties to proceedings by county courts for the establishment, location, or alteration or construction of county roads and bridges, and cannot appeal from the action of the county court therein. Under any other rule, it would be impossible to say when litigation would occur, when it would end, what would be the public cost, or what would be the delay and obstruction in these matters so essential to the public welfare." The Supreme Court of Virginia announced the same doctrine in *Supervisors v. Gorrell*, 20 Grat. 484. Of course, the citizen may object to the taking of his property for public uses without compensation, and interfere. But how does he inter-

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fere? Not by making himself a party to the unauthorized proceeding. He is not bound to subject himself and his rights to the assumed jurisdiction of a county court or a municipal council and review its action by certiorari in order to obtain relief. He appeals to a judicial tribunal having the power to settle and determine questions affecting his rights. He is entitled to have such important matters determined in the first instance, as well as finally by a court, by a judge or judge and jury, upon regular proceedings, according to the course of the common law, and not in an irregular, haphazard proceeding by mere agents of the state, unlearned in the law, and charged with mere ministerial or legislative powers. Although the citizen may have a special interest in the sense of being damaged by the exercise of the sovereign power to establish roads, if his property is not actually taken, but only injured, he still has no power to interfere, and must resort to his action at law for damages. *Spencer v. Railroad Co.*, 23 W. Va. 406; *Arbendz v. Railroad*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Watson v. Railroad Co.*, 49 W. Va. 528, 39 S. E. 193. A work of internal improvement authorized by law, whether carried on by a private or a municipal corporation, is an exercise of police power delegated by the Legislature, and is not subject to judicial control and is not itself judicial action. Corporations exercising such power are, so long as they confine themselves within the authority conferred, beyond any restraint at the hands of the judiciary. If, in the exercise of such power, they transcend the authority conferred upon them by the Legislature, they are, in some form of action, amenable to the power of the courts, at the instance of any individual injured thereby, and their decision or mere declaration that they have power, when they have not, affords them no protection.

The granting of a license, privilege, or franchise to a street railway in the streets of a city, town, or village is so manifestly an act affecting the street itself, the care and custody of which is, by law, intrusted to the council, by way of exercising part of the police power of the state, as to preclude the idea that such grant can be anything other than an exercise of such power. This is not disputed. Nor can it be denied that the repeal of the ordinance granting such privilege, or a declaration of forfeiture in any other form, is a function of the same kind. But it is suggested that inquiry and determination as to the cause or ground of forfeiture is judicial. If so, it is only incidentally performed in the exercise of police power. It is not the thing done, the function performed, but a mere incident thereof. It is not the whole, including the exercise of police power as one of its parts, but is itself a mere part, governed, overshadowed, controlled, and limited by something larger—a matter or function in government which, for reasons of public policy, is not required to wait on the slow process of judicial determination of private rights which are incidentally and occasionally affected, but not extinguished by it, and, if injured, may be vindicated by proper remedies in the courts, in which the necessary judicial

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power for that purpose is lodged. It is an inclusive, subsidiary, or incidental power, which in the nature of things can be no broader than the thing to which it is incidental. Like the stream which can rise no higher than its source, or the blood which cannot circulate beyond the body to which it belongs, this function, be it quasi judicial or not, cannot operate or be effective beyond the limits of the act or proceeding in which it is performed. It does not determine the character of the proceeding in which it is performed, or alter or enlarge its nature. That is determined by the division of governmental powers, effected by the organic law of the state. The very nature of the police power and the necessity for its free and prompt exercise forbid any such restriction upon it as judicial supervision and control. To make it effective, those charged with its enforcement must be as free from restraint, as long as they confine themselves within their authority, as individuals are. Must there be citation and hearing before the city authorities may tear down a building as a means of stopping a disastrous conflagration? If a man erect a house or barn in the center of the principal street of a populous city, is he entitled to demand notice and a full judicial hearing before it can be removed? If, instead of so proceeding, the authorities abate it immediately, are they trespassers simply for lack of such judicial proceeding, to be punished with costs and nominal damages in a case in which they have violated no right, and done no wrong, other than that of failing to obtain an adjudication of the right to do what they have done? Are municipal corporations to be mulcted in costs attendant upon judgments for nominal damages for mere technical invasions of the rights of the citizen, as well as delayed in the exercise of the important powers conferred upon them for the promotion of the health and comfort of the people, the maintenance of order, and the prosperity and general welfare of the community? If we say the function is judicial in the full sense of the term, all these questions must be answered affirmatively, and such results attained as would paralyze the police power of the state. It is not a question of due protection of the rights of the citizen. It is not enough to say he may, by his writ of certiorari, accompanied by bond, supersede the action taken against him, pending the determination of the rightfulness of his claim. That covers but one side of the question. What about the public? Is it duly protected and vindicated, or is it hampered, clogged, and paralyzed? If we say the function is judicial, we allow the citizen, in obtaining vindication of his rights, to stop the machinery of government. If we say it is not judicial, he still has his remedy in the courts for any injury done him, as in the case of injury done him by a private individual, and the machinery of government goes on performing its functions, while he prosecutes his rights in the courts. He is no more entitled to stop, impede, or delay the operations of government, except to prevent irreparable injury, than to stop an individual. Are not the interests of the general public as great and as justly entitled

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to protection and freedom as those of his fellow man? The only exception to this is the case of irreparable injury, which may be prevented by injunction, as in cases of irreparable injury at the hands of individuals. If we say it is not judicial, there is no adjudication against the citizen. He still has his remedy. There is therefore no want of process. The Legislature of the state, in declaring a forfeiture, performs exactly the same function that the council performed in this case. It necessarily ascertains the existence of cause of forfeiture. An individual, in declaring the forfeiture of a contract right, does the same thing. But no court has ever regarded such declaration in either case as an adjudication. Nor do they so regard such declarations made by municipal councils.

This court, in *Railroad Co. v. Town of Alston*, 54 W. Va. 597, 46 S. E. 612, said: "If the council improperly annulled its orders or ordinances assenting to the plaintiff's occupancy of its streets, the plaintiff could treat such annulment as void, or it could have the same reviewed and reversed by proper judicial method of review." In *Street Railway Co. v. Asheville*, 109 N. C. 688, 14 S. E. 316, the court held as follows: "Where a city, by authority of its charter, granted a street railway company the right to construct a branch road over a certain street, it cannot, by a subsequent ordinance, arbitrarily annul its license; and when, under such latter ordinance, it attempts by force to prevent the completion of the road then in process of construction, injunction will issue restraining the city from such interference." In *Railway Co. v. Easton*, 133 Pa. 505, 19 Atl. 486, 19 Am. St. Rep. 658, this declaration of principles was announced: "A railway track, laid upon a city street in good faith, under a corporate charter granted for the purpose, but not endangering the health or safety of the inhabitants, cannot be classed among the nuisances which the city authorities may abate summarily without resort to the processes of the law, even though, by reason of the manner of its construction, it may obstruct the street to such a degree as to amount to a nuisance. When the authorities of a city have declared such a track to be in violation of a municipal ordinance and a public nuisance, and have summarily undertaken to remove it by force, and the railway company prays for an injunction against such removal, the city not applying, by cross-bill or otherwise, for a legal adjustment of the differences between the company and itself, the injunction will be granted without regard to the merits of the controversy." In *Bond v. Newark*, 19 N. J. Eq. 376, 384, the court said, speaking of municipal corporations: "All legislative acts or exercise of discretionary powers, within their authority, are beyond the control of the courts, however unwise or impolitic, or even when done from corrupt motives, or unworthy purposes. * * * But when the corporations have fulfilled their legislative functions, and have exercised their legislative discretion, and are about to fulfill a contract by paying for its performance with the money of the lot owners, they are not acting in a legislative capacity, but as

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agents." In *Railroad Co. v. Cape May*, 35 N. J. Eq. 419, Van Fleet, V. C., after quoting part of the above language, said, when the corporation "are about carrying their legislation into execution, then, if the effect of their act is to violate vested rights or inflict irreparable wrong, the courts may properly intervene." That case decides that injunction does not lie to prevent the repeal of an ordinance, but does lie to prevent the tearing up of a railroad pursuant to such repeal, and thereby, in effect, denies judicial effect to the action of the council. In *Railroad Co. v. Paterson*, 24 N. J. Eq. 158, 168, the court said: "The ordinance complained of is manifestly intended as a means to an unlawful end, as a basis of operations for removing the track in Colt street. There is no good reason for the course of procedure on which the city have entered in this matter. They cannot be permitted, under such circumstances, to pursue it."

In *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496, Chief Justice Waite, in speaking of the reserved power to amend or repeal the charter of the Union Pacific Railroad Company, said: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually reduced to possession, of contracts lawfully made." In *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684, Ruger, C. J., said: "It is also to be observed that in none of the provisions for repeal in this state is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequences of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irreparable, or to undo what has been lawfully done under power lawfully conferred." The same judge, in speaking of the grant by the city of New York to the Broadway Surface Railway Company of the right to use the streets, said: "Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they are grants in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for the purpose of a street railroad." Both on reason and authority, a charter, lawfully granted and duly accepted and acted upon, has all the elements of a contract and is binding upon all the parties to it, and enforceable, if not always in the same manner yet to the same extent, as an ordinary agreement between natural persons." Booth on Street Railways, § 8. In *Street Railway Co. v. Circuit Judge*, 113 Mich. 694, 71 N. W. 1073, the court held it competent for a city council to declare a forfeiture upon a conceded

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and undisputed breach of a condition. Plainly this means that the forfeiture is effective only in such case, just as such a declaration by an individual is effective when he has the right to make it, and therefore has none of the efficacy of a judicial determination.

The decision of *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906, may seem to be inconsistent with this position, but it does not clearly propound a different doctrine. Whether it was intended there to give to the resolution of a municipal council the dignity and force and effect of a judicial decision, binding upon the citizen and denying to him any remedy except by way of appeal from it, is not at all clear. In the paragraph of the opinion which seems to countenance this view, it is admitted that the proceeding for abatement of a nuisance is an exercise of delegated police power, and no authority is cited for the position that a judicial function is involved. The question of its conclusiveness is propounded and not answered except by the holding that there is a right of review by certiorari, and possibly of action for damages. If, after such abatement, a right of action exists, it is plain there has been no adjudication of the fact of nuisance. There cannot be two adjudications of the same right. One precludes the possibility of another, if pleaded. The trouble with the decision in the *Town of Davis v. Davis* is its failure to distinguish between the function of abating a nuisance and that of determining what is a nuisance. Abatement is the exercise of police power. That power the Legislature has conferred upon the councils of cities, towns, and villages, but does not confer upon them the general judicial power necessary to determine what is a nuisance. They may determine it in a qualified manner, just as an individual, in the exercise of his common-law right of abatement, may determine for himself what is a nuisance. His determination of that question is binding upon nobody. In like manner, the determination of the same question by a municipal council is a determination for the sole purpose of coming to a decision as to whether it will exercise its power of abatement. After having done that, as in the case of an individual, it acts at its peril. If, assuming that to be a nuisance which is not, it destroys it, the preliminary declaration affords it no protection and is not binding upon the citizen. When a court of competent jurisdiction determines that a thing is a nuisance, its decision, until reversed, is final and conclusive. Whether the thing be in fact a nuisance or not, it becomes in law a nuisance by force of the decision. The courts everywhere say no such power is vested in a municipal corporation or in the Legislature of the state itself.

In *Hutton v. City of Camden*, 39 N. J. Law, 122, 23 Am. Rep. 203, the court said: "The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the hands of the individual, is a common-law right, and is derived in every instance of its exercise from the same source—that of necessity. It is akin to the right of de-

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stroying property for the public safety in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind."

Dillon on Municipal Corporations (4th Ed.) at section 374, says: "This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such." In *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, Mr. Justice Miller said: "But the mere declaration by the city council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities."

All this argues lack of judicial power in such tribunals. It is because of want of such power and authority that their resolutions, declarations, or determinations, respecting personal and property rights, are ignored by the courts. Being nonjudicial, the authority must be ministerial, legislative, or executive. It may be that the court, in *Town of Davis v. Davis*, entertained the view that, in the exercise of police power, there is a right of review by certiorari, although the proceeding is not an adjudication, precluding a resort to the courts for damages. Whether, so viewed, the decision is sound, there is no occasion to say; and, but for the close analogy between that case and this, it would be unnecessary to re-examine it. It is not a case exactly in point, but many of the general principles involved in it are, to say the least, very similar to those governing this case. Being firmly of the opinion that the council of a municipal corporation is not clothed with the requisite judicial power to finally determine questions of property rights, in such cases as this, we cannot recognize it as authority binding upon us in this class of cases, and we leave its exact status and effect in nuisance cases to be determined whenever the necessity therefor shall arise. Nor are we to be understood as saying or intimating that the Legislature cannot confer, or has not conferred,

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limited judicial power upon municipal corporations for the punishment of offenses and violation of ordinances.

Having reached the conclusion that jurisdiction in equity is not precluded by the action of the council, the next question is whether there has been such nonperformance of covenants as give power to forfeit by property proceedings. Authorities already cited, to which many more might be added, show that, by acceptance, the ordinance became a contract. Can it have effect otherwise than according to its terms? To say that it can would be to deny to parties the power to determine their respective rights by contract, or, to say, after a contract has been made, its terms may be disregarded. Courts cannot do that, the power to do which is denied to the Legislature by both the state and federal Constitutions, namely, deny, relieve from, or refuse to enforce, the obligations of contracts. Noncompliance with the terms and conditions of the ordinance is frankly admitted, and the prayer for relief stands upon the allegation of substantial compliance. This argument is addressed to the court, concerning, not implied conditions, which the law reads into a contract in order to work out equity and justice between the parties as to matters not provided for by express stipulation, or express conditions, violation of which is not, by express stipulation, made cause of forfeiture, but conditions and covenants plainly written in the contract and the penalty for violation of which is expressly made a cause of forfeiture. Courts of equity have large powers for the vindication of equitable rights, and, under peculiar circumstances, for the amelioration of the rigidity of the law, but they cannot, any more than courts of law, ignore or violate contract rights fairly and properly acquired. There is here no suggestion of fraud or mistake in the procurement of the contract. It was deliberately and fairly entered into. Substantial compliance with the terms of an express contract never excuses the party in fault or supports a prayer for equitable relief against its obligation. The party not in default may hold the other to the performance of so much as he is able to do. He has a right of election to take that, rescind the contract, or, standing upon it, sue for damages for the breach. But no instance is recalled in which one party to a contract has been permitted to compel the other to accept less than full performance.

The authorities relied upon to sustain the position that substantial compliance with conditions, the violation of which is expressly made ground of forfeiture, do not support that view. They are all cases in which the ordinances did not say failure to comply with certain specific conditions, the conditions there in question, should result in forfeiture of the privilege granted. There was no such stipulation in the act construed by the Court of Appeals of New York in *people v. Broadway, etc., Co.*, 26 N. E. 961. The propositions asserted in *Booth, St. Rys.* § 45, are inapplicable for the same reason. At section 46 of the same work it is said: "But if the statute provides that

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upon such failure the franchise shall be terminated or shall cease, the default will put an end to the franchise without judicial proceedings, and the Legislature may confer the franchise upon any other company or person." And this is fully sustained by the following decisions cited in support of it. In re Brooklyn, etc., Ry Co., 72 N. Y. 245; In re Brooklyn, etc., Ry Co., 75 N. Y. 335; Brooklyn, etc., Ry. Co. v. City of Brooklyn, 78 N. Y. 524; Oakland R. R. Co. v. Oakland, etc., R. R. Co., 45 Cal. 365, 13 Am. Rep. 181. Continuing, the author says, in the same section: "The same rule applies to a grant made by ordinance. Accordingly, if the company fails to build within the time fixed by the local authorities, the privilege no longer exists. Such consent is a mere license, and until the grantee avails itself of the privilege, no obligation or relation arises which requires a judicial declaration of forfeiture. After the time expires, a renewal of the privilege is necessary to entitle the company to occupy the streets and build its road." This is sustained by Ft. Worth Ry. Co. v. Rosedale Ry. Co., 68 Tex. 169, 4 S. W. 534, and Grand Rapids St. Railways, 48 Mich. 433, 12 N. W. 643. For similar applications of the same principle, see Ward v. Sea Ins. Co., 7 Paige (N. Y.) 294; Matter of Jackson, etc., Ins. Co., 4 Sandf. Ch. 559. "Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it, and would therefore be no ground for its annulment, although it would be competent for the crown, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them." Eastern, etc., Co. v. Regina, 2 El. & B. 856, 870. As to railway franchises and privileges, see, also, Railway Co. v. Railway Co., 45 Cal. 373, 13 Am. Rep. 181; Myrick v. Brawley, 33 Minn. 377, 23 N. W. 549. In the absence of the stipulation for forfeiture as to the conditions not complied with here, it could be held, consistently with all authority, that there has been a substantial compliance with the contract as a whole, and, therefore, no cause of forfeiture. But it is competent for the parties to make any condition a material and essential part of the contract. As these parties have done so, how can the court deny to one of them the benefit of the contract, or relieve the other from its obligation? A distinction between conditions precedent and conditions subsequent is made by the courts. The condition in this case belongs to the latter class, but the distinction does not seem to relieve the company. In the former class, no declaration or adjudication of forfeiture is necessary, but in the latter it is, since noncompliance may be waived. Hovelman v. Railroad Co., 79 Mo. 632; Chicago v. Railway Co., 105 Ill. 73, 78.

Having thus determined that there was, on the face of the contract, cause for forfeiture, it remains to be determined whether such steps were taken by the council as to work, in law, a forfeiture; and, if so, whether the circumstances under which it has been done, and the conduct of the municipal authorities in accomplishing it, have been such as to call upon a court of

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equity to ignore it or to relieve against it. In dealing with this situation the court must keep its eye upon both sides of this contract and both parties to it. It is not a one-sided affair. It places duties upon both. Under the strict letter of the contract mere failure to comply with conditions works no forfeiture. However great the cause of forfeiture, it does not occur until it has been legally and properly declared by the corporation. The mode of effecting it is prescribed by the ordinance. It requires three months' notice of intent to declare it, accompanied by specification of the cause. The ordinance was passed in 1896. Within a short time after that, the road was built and was then operated until August, 1901, without any steps having been taken by the town, in the manner prescribed by the ordinance, to require compliance with these conditions. For four or five years the town acquiesced in absolute noncompliance on the part of the railway company. There is no proof or evidence showing that any notice was ever served upon the company specifying these instances of noncompliance. There is some evidence tending to show that officers of the town had been directed to serve notice on the company, and that one member of the council did verbally make a demand upon, or request of, the president; but it does not appear that any such notice as is prescribed by the ordinance was ever given. But if such notice had been given, and not followed by any further action, it would simply tend to prove acquiescence and waiver. In August, 1901, after four or five years of acquiescence, the council took steps to forfeit by service of notice. Then before the expiration of the time allowed there was a partial compliance with the requirements of the notice—a substantial compliance with its requirements. In view of the long acquiescence of the authorities of the town, the railway company may well have supposed, and no doubt did suppose, that no action to forfeit the franchise would be taken under these circumstances. If the testimony of the manager is entitled to credit, and there seems to be no reason for believing otherwise, the failure to comply fully was due, in part, to disappointment in obtaining the lumber from the place, and within the time, contemplated by the company. He says the order was given to mills in the country, but, as time went on and it did not arrive, they were compelled hastily to obtain it from somebody in the city. They gave the order for first class lumber, and under that order lumber was furnished and put down by the company's employees. It did not prove to be of the requisite dimensions and some portions of it were unsound and it had the appearance of being old, but it had never been used. This repealing ordinance was passed immediately after the timber was put down and possibly before it was all down, and without any intimation of dissatisfaction with the work. Immediately afterwards, the manager of the railway company applied to members of the council for information as to their objection to the work and offered to remedy the defects, but

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was informed that the ordinance had been repealed and all rights of the company forfeited.

While the town has the right to require full and complete performance of all covenants on the part of the railway company, and is not bound to accept a mere substantial performance, its authorities, in proceeding to take away the rights of the company, pursuant to the terms of the ordinance, must deal frankly and fairly with it. They must act in good faith and not endeavor to pervert this forfeiture clause to a purpose for which it was never intended. Neither party ever supposed it would be used for any purpose except to compel performance of the covenant entered into by the railway company. The public interests required the construction and operation of the railway. That was the inducement or consideration moving the town to the passage of the ordinance. It was also of interest to the public that the streets be kept in good condition. Hence, the provisions in reference to them, and the right of forfeiture to enforce performance thereof. That clause was never inserted for the purpose of ousting the railway company from the occupancy of the streets merely to get rid of it or to compel it to seek a new franchise with conditions more favorable to the town, nor at all, unless it refused to perform its covenants. Nothing in the answer of the defendant suggests a desire to get rid of the railway. On the contrary, it evinces a desire to keep it, but to impose conditions more favorable to the town than those contained in the present ordinance. On the whole, the evidence evinces a purpose, not merely to enforce compliance with the conditions of the ordinance under which the railway company had been operated, but to force that company to apply for a new franchise with new conditions, a purpose wholly foreign to the forfeiture clause. This motive apparent on the face of the answer and in the evidence, taken in connection with the circumstances and conduct hereinbefore adverted to, tends to prove that the declaration or forfeiture was not made in the utmost good faith, that the failure on the part of the railway company to comply with conditions was not willful, in the sense of obstinacy, but, at the worst, negligent, and that the previous acquiescence and delay on the part of the town, followed by the sudden and speedy repeal of the ordinance operated as a surprise upon it. By this, actual fraud is not imputed to the authorities of the town. Nor is it intended to impute any dishonest motive or purpose to them. It is an error of judgment, a misconception of legal rights and duties, working inequitable results. The answer shows a frank avowal of sincere belief on their part in their right to use this power of forfeiture to coerce a more liberal proposition from the railroad company, and shows an utter lack of appreciation of the force and effect in equity of their long acquiescence in nonperformance and the suddenness of the blow they have attempted to deliver by repealing the ordinance. Not being chancellors, conversant with the principles of equity, they could, as many others have done, easily fall

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into errors of grave character without being guilty of the least dishonesty or fraud in the ordinary sense of the terms, and it is perfectly apparent that they have done so. Such circumstances warrant intervention by a court of equity to relieve from forfeiture, when no pecuniary or substantial injury has resulted and full performance of the covenant can, and will, be effected. Willingness and desire to comply strictly with all its covenants is plainly expressed by the railway company in its bill, and was verbally communicated to the town authorities immediately after the forfeiture was declared, when the ink on the repealing ordinance was hardly dry. As to the ability of the company to make full compliance, there is no question. Under these circumstances, is it equitable and just to the company, or promotive of the public interests, to destroy this railway? It represents an investment of thousands of dollars and affords means of convenient and rapid travel and transportation for the people of the town and the general public. Why so great a punishment for such slight cause? It is unprecedented so far as the authorities examined disclose. If the injury could not be remedied, or the railway company stood defiant, refusing to perform, the case would wear a different aspect, but it does not. It is willing to perform to the letter—to pay to the last farthing.

In *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151, this court applied the principle of relief against forfeiture, and declared as follows in respect to forfeiture of an oil lease: "In case of such a lease, if the lessor by his conduct clearly indicates that payment will not be demanded when due, and thus lulls the lessee into a feeling of security and throws him off his guard, and because of this he does not make payments when due, the landlord cannot suddenly without demand or notice declare a forfeiture, and there is no forfeiture which equity would recognize, and, if there is in such case technically a forfeiture at law, equity would relieve against it." It may be objected that because the covenant violated here is not a pecuniary one, jurisdiction in equity to relieve it does not exist. It is said that in the English courts equity will only relieve in such cases. But this is not strictly accurate. Where the covenant is pecuniary, and there is default and consequent forfeiture, equity will relieve independently of the circumstances of fraud, accident, mistake, and surprise. But, where fraud, mistake, accident, or surprise enters into the matter, or the forfeiture has resulted from only negligent conduct on the part of the covenantee, equity will interfere, although the covenant be for the performance of some collateral matter and not for the payment of money. Story, Eq. Jur. § 1323. In section 1324 of said work it is said that in America the narrow doctrine of the English courts and the restricted application of jurisdiction to relieve from forfeitures would be received with hesitation, and, substantially, that the jurisdiction is broader in this country. In cases of forfeiture for nonperformance of pecuniary covenants, relief in equity goes as a matter of course, where compensation may be made, but in other

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cases, unless the delinquency is willful, the court has discretionary power to relieve. "A court of equity has power to relieve a party against forfeiture or penalty incurred by the breach of a condition subsequent, when no willful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice and oppression." *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657. The forfeiture in this case was for failure to pay an assessment for a sewer. "When a mortgagor, without his fault or neglect, is prevented by accident from paying an installment on the day named in a decree of foreclosure, on a bill brought to redeem, equity will grant relief; and he will be reinstated, but on terms that he satisfy the equitable rights of the other party." *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742. "Equity will relieve against a forfeiture incurred by the breach of a covenant to insure in a lease of real estate, caused by accident or mistake, if no actual damage has been sustained by the lessor." *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323. "A court of equity may grant relief from the forfeiture of an estate conditioned for the maintenance and support of the grantee, where the forfeiture was accidental and unintentional, and not attended with irreparable injury. But it rests in the sound discretion of the court when relief shall be granted in this class of cases." *Henry v. Tupper*, 29 Vt. 358. This is a leading case, and the opinion was written by Chief Justice Redfield, who, in the course of his opinion, said: "That relief might be granted in equity, even where the condition was for the performance of collateral acts seems to be admitted in most of the cases upon this subject. *Webber v. Smith*, 2 Vernon 103; *Hack v. Leonard*, 9 Mod. 90; *Cox v. Higford*, 2 Vernon 664; *Saunders v. Pope*, 12 Vesey, 282. These are cases of nonrepair of premises leased; and the chancellor, Lord Erskine, says in the last case: 'I cannot agree it is necessary the nonperformance of the covenant should have arisen from mere accident or ignorance.' The cases are abundant where relief has been granted against forfeiture of title by nonperformance of other collateral acts, as for not renewing a lease (*Rowstone v. Bentley*, 4 Br. C. C. 415), or for cutting down timber when covenanted against, on pain of forfeiture (*Northcote v. Duke*, *Ambler*, 511; *Thomas v. Porter*, 1 Ch. Cas. 95). But it has been held relief will not be granted where the forfeiture arises from an act incapable of compensation, although of no essential damage to the other party, as the breach of a condition not to assign. *Wafes v. Mocato*, 9 Mod. 112. The same rule obtains where the forfeiture arises from an omission to insure. *Rolfe v. Harris*, 2 Price, 206. * * * It seems, however, to be pretty well established in England that relief for nonrepair of premises will not be granted as matter of course, and especially when there was a willful default (*Bracebridge v. Buckley*, 2 Price, 200; *Hill v. Barclay*, 16 Vesey, 403 and 18 Vesey, 56); but where the failure is from 'accident, fraud, sur-

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prise, or ignorance not willful,' relief will be granted (2 Lead. C. in Equity, 464, 465; *Eaton v. Lyon*, 3 Vesey, 693)—the result of all which seems to be that there is no well-settled rule upon the subject, or none which is not liable to considerable variation, and to be affected by the circumstances of the particular case. * * * But we must all feel that cases of the character before the court should be received with something more of distrust, and relief afforded with more reserve and circumspection, than in ordinary cases of collateral duties. And although we are not prepared to say that it must appear that, in all cases, the failure arises from surprise, accident, or mistake, we certainly should not grant relief when the omission was willful and wanton, or attended with suffering or serious inconvenience to the grantee, or there was any good ground to apprehend a recurrence of the failure to perform, as was held in *Dunklee v. Adams*, 20 Vt. 421, 50 Am. Dec. 44."

It may be objected here that this position is in violation of the rule that equity will not relieve against a statutory forfeiture. Pom. Eq. Jur. 458; *Railway Co. v. Fitler*, 60 Pa. 124, 100 Am. Dec. 546. But this ordinance partakes of the nature of a contract. It is generally held, in such cases, that the relation of the parties is contractual. The power of municipal corporations to contract cannot be denied. This ordinance is not a statute. By its very terms it establishes a relation of contract. It does not provide for forfeiture without action on the part of the council. Unlike a statute granting a privilege or franchise and declaring forfeiture as the penalty of noncompliance with conditions, it provides for notice and active steps on the part of the council to bring about forfeiture. It was agreed that, in order to effect a forfeiture, the town authorities should adopt just such methods as one individual resorts to to bring about the forfeiture of the rights of another individual under a contract existing between them. Municipal authorities are agents as well as legislators, and are, in great measure, subject to the legal principles governing transactions between private persons. Many cases hold that municipal corporations are precluded by their conduct from enforcing forfeitures. "A court of equity will not enforce a forfeiture of the rights and privileges of the grantees in a contract for their failure to complete their performance of it in time, where the party seeking the forfeiture was guilty of the first breach of the agreement." *Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333. In that case, the party seeking forfeiture was a municipal corporation. "Where a street railway company has expended large sums of money and exercised due diligence in building and operating its road, so as to comply with an ordinance of permission, but unforeseen circumstances have caused a delay, which has occasioned no pecuniary injury to the township or its inhabitants, equity will interfere to restrain the adoption of an ordinance by the township declaring a forfeiture of the franchise of the corporation because it did not comply with the statute of permission, which provided that cars should

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be running at a certain headway, on a continuous line of double track, within a specified time." *Railway Co. v. South Orange*, 58 N. J. Eq. 83, 43 Atl. 53. In *Chicago v. Railroad Co.*, 105 Ill. 73, the court enjoined the city from interfering with the laying of the track of a railway company after the expiration of the time limited by the ordinance, because the company had been prevented by injunctions, and by the police officers of the city, acting under the direction of the mayor, from prosecuting its work, in consequence of which the limit expired before it was completed. In this respect municipal corporations seem to stand upon the same footing as individuals. They are subject to the law of estoppel by acts in pais. "But of late years, much more than formerly, the doctrine of estoppel, most wholesome and just in its operation when properly applied, has been extended to these municipal corporations, so as to bind and conclude them by their own acts and acquiescence, and the acts and acquiescence of their officers, wherever an estoppel would exist in the case of natural persons." *Kneeland v. Gilman*, 24 Wis. 39. See, also, *Martel v. East St. Louis*, 94 Ill. 67; *Railroad Co. v. Joliet*, 79 Ill. 25; *Wilson v. Wheeling*, 19 W. Va. 323, Syl. point 12, 42 Am. Rep. 780. This is subject to the limitation that the subject-matter must not be ultra vires—must be within their authority. Here the town had undoubted right and power to waive nonperformance of covenants, or extend time.

As above indicated, however, there must be full performance of the covenant as a condition of relief. The relief is against the forfeiture, on the ground of inequitable conduct, working surprise, not against the contract or from its obligation. We do not take away either the right to have the delinquency made good or the power to forfeit for future delinquencies. The covenants for the nonperformance of which forfeiture has been declared must be performed, and that fully and promptly. In the event of refusal to perform, another question would arise, namely, whether the bill should be dismissed or retained and affirmative relief granted the defendant by way of enforcement of the forfeiture. As we cannot say such contingency will not arise, though there is hardly any probability of it, we must now give direction as to the course to be pursued in that event, else the principles of the cause will not be fully settled, and another appeal might result, involving a question already presented on this appeal. Cross-relief has been given by the decree. Never to declare or enforce a forfeiture, or divest an estate or title for violation of a condition subsequent, is an invariable rule of equity, if there is a legal remedy. Under such circumstances, a court of equity utterly declines to touch the case and leaves the party to his legal remedies. In the language of a former able judge of this court, now deceased, equity abhors a forfeiture. Our leading case on the subject is *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363. See, also, *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 415, 8 Am. Dec. 598; *Horsberg v. Baker*, 1 Pet. (U. S.) 232, 7 L. Ed. 125; *Marshall v. Vicksburg*, 15 Wall.

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146, 21 L. Ed. 121. This is different from an appeal to equity for aid in the abatement of a nuisance. In such case there is no forfeiture, and no vested title or right as against the public. The thing proceeded against is wrongful. Here, a title vested by contract, and the effort is to take it away by forfeiture. To do this the town must resort to its legal remedies, if any are available. Besides the right of abatement without judicial proceedings, if it can be done peaceably, there are remedies in the law courts. There is much authority for the position that a municipal corporation has its possessory action for a street against a railway having no right to occupy it. Dillon, Munic. Cor. §§ 662, 723. What others it may have it is unnecessary to inquire. To prevent equity jurisdiction for this purpose, it suffices that there is one.

Agreeably to the principles and conclusions above stated, the decree appealed from will be wholly reversed, with costs, and the cause remanded to the circuit court of Ohio county, with directions to perpetuate the injunction, if the covenants in question shall be fully and properly performed by the appellant within a reasonable time to be allowed for the purpose, if they have not already been so performed, but without prejudice to the right and power of the town of Triadelphia to forfeit the privileges of the appellant under the said ordinance for any future failures to comply with the conditions thereof, and to dismiss the bill if the appellant shall refuse to perform said covenants within the time to be allowed therefor, as aforesaid.

MOBILE, J. & K. C. R. Co. v. KAMPER.

(Supreme Court of Mississippi, July 6, 1906.)

[41 So. Rep. 513.]

Railroads—Conveyance to Road—Conditions—Railroad Purposes.—Where a deed conveyed land as a donation to a railroad company "for railroad purposes only," the grantor could not obtain a cancellation of the conveyance on the ground that it was understood that defendant would use the land in connection with a main line through the town where the land was situated, but that it had only built a branch.

Same—Abandonment of Land.*—Where land was conveyed to a railroad company for railroad purposes only, and thereafter the road abandoned some of the land, the grantor was entitled to recover that part of the land abandoned.

Appeal from Chancery Court, Perry County; T. A. Wood, Chancellor.

Suit by John Kamper against the Mobile, Jackson & Kansas

*For the authorities in this series on the subject of the forfeiture of land conveyed for railroad purposes for failure to comply with terms of grant, see foot-notes appended to *Bain v. Parker* (Ark.), 19 R. R. R. 614, 42 Am. & Eng. R. Cas., N. S., 614.

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City Railroad Company. From a decree overruling a demurrer to the bill, defendant appeals. Affirmed, and remanded for proceedings in accordance with the opinion.

Kamper filed his bill in the chancery court to cancel a conveyance made by him to the appellant railroad company of certain real estate in Hattiesburg, conveyed to appellant as a donation by a general warranty deed. The following clause appears in the deed, to wit: "It is distinctly understood that the above-mentioned lots and rights of way are donated for railroad purposes only." The bill alleges that at the time this deed was made it was understood that the appellant would build its line from Mobile, Ala., to Jackson, Miss., "through" Hattiesburg, but that subsequently this route had been abandoned, and a branch only of said road built "to" Hattiesburg. It alleged that appellee was interested in the development of the territory through which the road would pass, and that he made the donation to appellant in aid of the road as originally projected. It also charges the abandonment by the appellant of certain parts of the property donated. The railroad company demurred to the bill, the demurrer was overruled, and the railroad company appeals.

May & Flowers, for appellant.

W. H. Hardy and *Brame & Brame*, for appellee.

MAYES, J. The bill filed in this case shows that Kamper is still in possession of the property. It is only necessary for us to say that we think the action of the lower court in overruling the demurrer was proper; but, this appeal being prosecuted for the purpose of settling the principles of the case, we deem it necessary to say that complainant will not be allowed to show that the donation of the land for "railroad purposes only" was meant for the purpose of being used only for the road to be built from Mobile, Ala., through Hattiesburg, to Jackson, Miss. But the land will be deemed to have been used for the purpose of its donation when it is shown that it is used for any railroad purpose by the defendant company, appellant. The demurrer to the bill admits all the facts, and thereby admits that appellant has abandoned a part of the land conveyed by appellee and its use for railroad purposes. It only remains for us to say that the appellee should be allowed to recover such part of the land conveyed as is shown to have been abandoned by appellant, and that he should be denied relief as to such parts of the land conveyed as is shown that appellant is using for railroad purposes.

Let the decree be affirmed, and the cause remanded to be proceeded with in accordance with this opinion, and 30 days allowed defendant to answer after mandate filed.

LINCOLN TP. v. KANSAS CITY & O. R. Co. *et al.*

(Supreme Court of Nebraska, June 20, 1906.)

[108 N. W. Rep. 140.]

Railroads—Purchase on Foreclosure Sale—Liability of Purchasee.*
—A railroad corporation, which succeeds to the property and rights of another railroad corporation through the medium of a sale upon a decree of foreclosure, or other judicial sale, is not answerable for the general debts of the corporation whose property and franchises are thus acquired.

Municipal Corporations—Railroad Aid Bonds.—The right of a township in this state to maintain an action to recover the value of bonds voted by the electors of the township to aid in the construction of a railroad doubted.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Appeal from District Court, Kearney County; Hollenbeck, Judge.

Action by Lincoln Township against the Kansas City & Omaha Railroad Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Joel Hull and E. C. Calkins, for appellant.

J. W. Deweese and J. L. McPheely, for appellees.

DUFFIE, C. The plaintiff and appellant is one of the organized townships of Kearney county, Neb. Its petition filed in the district court in this case is very voluminous, but the material facts may be briefly stated as follows: In the year 1887 the Burlington & Missouri River Railroad Company, which then was and still is a part of the Chicago, Burlington & Quincy System, owned and operated all the railroads in Kearney county. About this time the defendant, the Kansas City & Omaha Railroad Company, was organized and projected a line from Fairfield, in Clay county, to Alma, in Harlan county. It solicited aid from the people of Lincoln township, and as an inducement to voting bonds represented to the electors of the township that the road would be operated in close traffic connection with the St. Joseph & Grand Island Railroad and with the Union Pacific Railroad and the various other lines known as the Union Pacific System; that it would give the people of the township the advantage of a competitive road, and increase their facilities for reaching competitive markets, and the interchange of business with the various towns and cities reached by the roads of the Union Pacific System. Acting upon these inducements the electors of the township on March 26, 1887, voted aid to the extent of \$23,500. The road was constructed, the aid bonds delivered to the company, and the road operated according to the representations

*For the authorities in this series on the question whether the purchaser of railroad property can be held liable on account of claims against the predecessor railroad company, see foot-note appended to *Hukle v. Atchison, etc., Ry. Co. (Kan.)*, 17 R. R. R. 692, 40 Am. & Eng. R. Cas., N. S., 692.

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made until about June 1, 1902. It is further alleged that the Kansas City & Omaha Railroad Company had issued bonds and secured them by a mortgage upon its road and franchises, and that the mortgage was foreclosed in the United States Circuit Court for the District of Nebraska, in 1896, and the road and its franchises sold to the Kansas City & Omaha Railway Company; that said new company took possession about September, 1896, and continued to operate the same, in traffic connection with the Union Pacific and Grand Island Systems and in competition with the Chicago, Burlington & Quincy System, until July 1, 1902; that on that date the Kansas City & Omaha Railway Company ceased to operate the road, and surrendered it to the Burlington & Missouri River Railroad Company, which road has ever since operated the same as a part of the Chicago, Burlington & Quincy System. It is further alleged in the petition that the Circuit Court of the United States, in its decree foreclosing the mortgage made by the Kansas City & Omaha Railroad Company, expressly reserved to said court the right to retake and resell all said property, rights, and franchises in satisfaction of any judgment which might thereafter be found against said Kansas City & Omaha Railroad Company upon any liability then existing against said company. Upon the theory that the representations made by the agents of the Kansas City & Omaha Railroad Company to secure the voting of bonds in aid of its construction constitute a contract between the company and the township and its electors, and that said contract has been breached by the failure of that company and its successors in the ownership of the road to operate the same in connection with the Union Pacific and Grand Island Systems, and in competition with the Chicago, Burlington & Quincy System, this action was brought to recover the value of the bonds donated to said road. A demurrer to this petition was overruled, after which the defendants answered, and a trial resulted in a judgment for the defendants, which we are asked to review.

It is true that in *Wullenwaber v. Dunigan*, 30 Neb. 877, 47 N. W. 420, 13 L. R. A. 811, and in *Nash v. Baker*, 37 Neb. 713, 56 N. W. 376, an action was maintained by a taxpayer to enjoin the issue of bonds voted in aid of a railroad company, upon the ground that false and fraudulent representations had been made by the company through its officers and agents by which the electors were induced to cast an affirmative vote upon the proposition. But in these cases the one whose property was to be affected, whose rights were endangered, was the plaintiff in the action. After a somewhat extended examination, we have failed to find any case which is a precedent for the one under consideration. The cases cited and relied upon by this court in its opinion in *Wullenwaber v. Dunigan*, *supra*, are all cases where the interposition of the court was sought to protect a plaintiff against the enforcement of a right claimed by the defendant, but grounded upon fraudulent acts of the railroad company or those of its agents. *Curry v. Board of Supervisors* (Iowa)

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15 N. W. 602, and *Sinnett v. Moles*, 38 Iowa 25, were cases to enjoin the collection of a tax voted in aid of a railroad company, the electors being induced to this course by false and fraudulent representations made by the company through its agents. *Wickham v. Grant*, 28 Kan. 517, and *Melendy v. Keen*, 89 Ill. 395, were actions upon obligations given by the defendants to aid a railroad company in the construction of its line. The defendants pleaded that the obligations were obtained from them through false and fraudulent representations made by the agents of the company, and this defense was held good. *Sandford v. Handy*, 23 Wend. (N. Y.) 260, *Vreeland v. New Jersey Stone Co.*, 25 N. J. Eq. 140, and *Davis & Co. v. Dumont*, 37 Iowa 47, hold that subscriptions to the stock of a corporation, if procured by fraud, will be set aside. *Burhop v. Milwaukee*, 18 Wis. 431, holds that a court of equity may relieve the cloud of a mortgage given a railroad company to secure a note executed as a stock subscription to the corporation when fraudulently obtained. And *McClellan v. Scott*, 24 Wis. 81, holds that fraudulent representations made by a railroad company relating to its pecuniary condition, is ground for avoiding a contract of sale of land obtained thereby. None of these cases are authority in support of the claim of the plaintiff in this action. In each of them, the action was brought, or the defense maintained, by the party directly interested and who would have been damaged by the enforcement of the contract. Another feature of these cases, which does not obtain here, was that fraud was the ground of the action. In this case no charge of fraud is made. From 1887 to 1896 the original company to which this aid was voted, operated its road and performed every condition upon which the aid was obtained and every representation made to the electors. Through no fault of its own and because of its inability to pay its just obligations, its property was sold under a decree of the United States Circuit Court and passed to another corporation, which operated the road from 1896 to 1902, apparently to the full satisfaction of every one concerned. No charge of fraud is made in the foreclosure proceedings, nor in the organization of the new company which bought in the property; nor is there any circumstance connected with these transactions giving rise to even a suspicion of fraud. The defendants, then, are liable, if at all, not because of any fraud perpetrated, but for breach of contract, and it is familiar law that claims for breach of contract cannot be awarded priority over the bondholders of a railroad company, nor do they become an enforceable claim against a corporation which succeeds to another on foreclosure proceedings. In *Austin v. Tecumseh National Bank*, 49 Neb. 412, 68 N. W. 628, 35 L. R. A. 444, 59 Am. St. Rep. 543, this court said: "In order to render a newly organized corporation liable at common law for the debts of an established corporation or firm to whose business and property it has succeeded, it should, in the absence of a special agreement, affirmatively appear from the pleadings and proofs that the transaction in question is

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fraudulent as to creditors of the old corporation, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation, are of such a character as to warrant the finding that it is a mere continuation of the former." In a note to the above case found in 59 Am. St. Rep. 543-558, numerous cases are cited in support of the rule that a railroad corporation which succeeds to the property and rights of another railroad corporation through the medium of a sale upon a decree of foreclosure or other judicial sale, is not answerable for the general debts of a corporation whose property and franchises are required.

It is claimed by the appellant that the state, in granting a franchise to the Omaha & Kansas City Railroad Company, extended the privilege which its charter conferred upon the condition that the company, on its part, should faithfully perform all the public functions required of it by law, and that this required it to operate its road in competition with that of the Chicago, Burlington & Quincy Railway Company. Conceding this to be true, it is evident that an action for damages for breach of contract is not an appropriate action to enforce such duty, and that the payment of damages would not tend in the least to that end.

There are other considerations which lead us to believe that the judgment of the district court should be affirmed. While the question was not argued, it is one of first impressions that the plaintiff cannot sustain the action. It has not been damaged in its corporate capacity or in any other way, so far as we can see from any matter alleged in the petition or offered in evidence. What interest has it in the alleged contract which entitles it to damages for a breach? It is true that the bonds were issued in the name of Lincoln township, but the electors of the township voted the bonds and the property owners have paid the same. What will be done with any money recovered by the plaintiff? To the credit of what fund will it be placed? Will the township itself become the absolute owner or will it be distributed among those from whom it was collected? Under what authority does the township prosecute this action for the taxpayers, the real parties in interest? What authority has it to distribute the fund and to whom shall the distribution be made? Are the present owners of the land who probably bought and fixed the price in contemplation of this tax, to receive it, or such portion of it as they have paid, or does the whole amount assessed against any particular tract belong to the owner at the time the aid was voted? Under what statute is it made the duty of the township to bring this action or where, in our laws relating to municipalities, is authority found for a township to bring and maintain an action in which it has no direct interest? To us it seems quite plain that the owners of the property upon which the tax was levied, and who had paid the tax making up the fund, are the real parties in interest and only ones who have any right to complain of a breach of the contract, if the representations which

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induced the voting of aid constitutes a contract in such a sense that a failure to observe its terms entitles the electors to complain and to maintain an action for damages. We incline to the belief that the demurrer to the petition should have been sustained.

We recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

FITZGERALD v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 25, 1906.)

[54 S. E. Rep. 391.]

Master and Servant—Injuries to Servant—Fellow Servants—Statutory Provisions.—Under Priv. Acts 1897, p. 83, c. 56, making all co-employees of railroad companies agents and vice principals of the company, so far as fixing the company with responsibility for their negligence is concerned, whether they be in superior, equal, or subordinate positions, a railroad company is liable for injuries to an employee, resulting from the negligence of his helpers engaged in shoveling coal from a coal car into a tender.

Same—Negligence of Master—Question for Jury.—In an action for injuries to an employee of a railroad company from the falling of a piece of coal which his helpers, were transferring from a coal car to a tender, between which the employee was working, evidence held to present the question for the jury whether the helpers were guilty of negligence.

Same—Res Ipsa Loquitur.*—Where an employee of a railroad company was engaged in work between a coal car and a tender, and his helpers were shoveling coal from the car to the tender, while they knew of his presence there, and he was injured by a piece of coal falling on him, the doctrine of "res ipsa loquitur" applies.

Brown, J., dissenting.

Appeal from Superior Court, Guilford County; Ward, Judge.

Action by Obadiah J. Fitzgerald against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Civil action to recover damages for an injury caused by alleged negligence on the part of defendant, tried before Ward, judge, and a jury at October term, 1905, of Guilford superior court. No contributory negligence was alleged in the answer, and the cause was submitted to the jury on two issues: (1) As to the defendant's negligence causing the injury; (2) as to damages. There was evidence tending to show that "plaintiff on the 11th day of July, 1904, at the time of the injury, was in the employ-

*See foot-notes appended to Choctaw, etc., Ry. Co. v. Doughty (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; Looney v. Metropolitan R. Co., etc., (U. S.), 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617.

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ment of the defendant as a hostler on the yard of the defendant at Winston, N. C., and it was his duty with his helpers, who were employed by the defendant, when any engine came in, to take charge of and cool it, clean out the fire, and put it away in its proper place. On the morning of the injury the engine had been moved up over the pit in which the fire was to be dumped along side of the coal car from which the coal was to be thrown into the tender. That this coal car was standing on a track parallel with the one on which the engine was standing, and, between the parallel tracks there was an open space, across which the coal was to be thrown. The engine had been standing with fire in it all night, and the fire had to be cleared from the engine and the water turned on the fire in the pit while the coaling was in progress. After the fire had been cleared from the engine and thrown in the pit, on the occasion of the injury, the water was turned through the hose which was attached to a hydrant, when the hose blew out so that the hose had to be fastened on again, and there was nobody to do this but the plaintiff. He was the only man to do this work around that point. The hydrant was in the open space between the coal car and the rear of the tender, and when the hose blew off, which had been insecurely fastened by the tankman to the hydrant, the plaintiff squatted down by the tank with the back of his head towards the tender and was attempting to fasten the hose on the hydrant. He was 2½ feet from the tender and about 8 feet from where the negroes were at work throwing coal straight across into the place in the front part of the tender for receiving and holding it.

The plaintiff, in his own behalf, testified that the lump of coal weighed about 100 pounds and evidently described the size and shape of the coal by indicating the same with his hands. He was asked (p. 11, Record) "How large was the coal?" and replied: "Of course, I could not tell the weight then, but the lump seemed to be about that long, and about that large around. Kind of an odd shape; seemed to be about a 100 pound lump, something like that." The court, on stating this part of the testimony to the jury, said: "As I got his testimony down, it was a large piece of coal, about 20 by 20 inches and a 100 pound lump." There was no objection to this part of the statement of the court, and we take it that, without question, the witness, when he said, "About that long and that large around," indicated to the court and jury the size of the lump by the position of his hands or some other objective measurement. On his examination in chief, this is stated, that one of the negroes threw the lump of coal that struck the witness. On cross-examination he stated that he did not know which one of the negroes threw the coal, because he could not see it leave their hands upon the car while he was down there discharging his duty, and for the same reason he did not know whether it went up on the tender and rolled off or struck the tender and fell off. In answer to a

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question by the defendant, the witness stated: "Q. Do you know who threw it? A. No; I do not know which one threw it, because I could not see it leave their hands upon the car, while I was there discharging my duty. Q. You don't know whether it came directly from the shovel onto your head or whether it went up on the tender and rolled off? A. No. Q. Nor whether it struck the tender and fell off? A. That is the information I had." The witness further testified that the coal should have been thrown into its bed or basin in the forward part of the tender. The negroes were engaged in throwing coal in the front end of the tender and did not have to throw the coal on the back end at all. That he did not know whether the boys saw him at the time. That they could have done so. He was at the rear end of the tender and on their side, but that they knew he had to work all around them while they were coaling. The plaintiff was permanently injured and disabled. There was a motion for nonsuit which was overruled, and the defendant excepted. The court, after defining at length "negligence" and proximate cause," charged the jury, in substance, that if defendant through its agents failed to exercise proper care, that care which a prudent man should use under the circumstances, in throwing the coal from the car to the tender, and such negligence was the proximate cause of the plaintiff's injuries, they should answer the first issue "yes." The charge also put the burden of the issue on the plaintiff. Defendant excepted. Verdict for plaintiff, and from judgment thereon defendant appealed.

King & Kimball, for appellant.

John A. Barringer, for appellee.

HOKE, J. (after stating the facts). The statute known as the "Fellow Servant Act," published as chapter 56, p. 83, Priv. Laws 1897, where the same applies, has the effect of making all co-employees of railroad companies agents and vice principals of the company so far as fixing the company with responsibility for their negligence is concerned. While commonly spoken of as the "Fellow Servant Act," it is entitled "An act to prescribe the liability of railroads in certain cases," and it operates on all employees of the company, whether in superior, equal, or subordinate positions. The two hands, therefore, who were shoveling coal, while they were there as "helpers" to the plaintiff, were the agents of the defendant, and, contributory negligence on the part of the plaintiff not being proved or even alleged, if the plaintiff was injured as the proximate cause of their negligence, the company is responsible. We do not understand that the defendant controverts, or desires to controvert, this position, but rests its defense on the ground that there is no evidence offered which requires or permits that the plaintiff's cause be considered by the jury, and this on the idea, chiefly, that, so far as the testimony discloses, it is just as probable that the injury was the result of an accident for which the defendant is in no way re-

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sponsible, or for negligence which may be imputed to the defendant as an actionable wrong. While this may be the law under given circumstances, we think that the principle has no place in application to the facts of the case before us.

It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and it is well established that, if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Thus, in *Shearman & Redfield on Negligence*, § 58, it is said: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default, but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not required to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and, as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence, a kind of evidence which might not be satisfactory in other classes of cases open to clear proof. This is on the general principle of the law of evidence which holds that to be sufficient and satisfactory evidence which satisfies an unprejudiced mind." In accordance with this general doctrine, in the well-considered case of *Howser v. Railroad*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, Roberts, J., says: "These and many English and American cases clearly establish the fact that it is not requisite that the plaintiff's proof in actions of this kind should negative all possible circumstances that would excuse the defendant. It is sufficient if it negatives all probable circumstances that would have this effect." In *Whitney v. Clifford*, 57 Wis. 156, 14 N. W. 927, Cassady, J., said: "The plaintiff is not required to prove his case so clearly as to exclude the possibility of any other theory." In *Stepp v. Railroad*, 85 Mo. 229, it is held: "Direct evidence of the want of the exercise of due care is not to be required to be produced. * * * Surrounding circumstances may afford as conclusive proof as direct evidence. Applying these rules to the case before us, we think the plaintiff was clearly entitled to have his cause submitted to a jury and the motion to nonsuit the plaintiff was properly overruled."

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This was not an ordinary case of loading coal into a wagon or car, where a lump of the coal might roll off at any time with no reasonable prospect of hurting anybody. On the contrary, these hands—and for their conduct as we have seen the defendant is responsible—knew that the plaintiff was working somewhere around and near the engine, and where, if a piece of coal rolled off, it was likely to strike him, and, if a heavy piece should roll and strike, it would do him serious injury. They were therefore charged with a high degree of care in this respect. This statement imports no infringement on the doctrine which obtains with us that there are no degrees of care so far as fixing responsibility for negligence is concerned. This is true on a given state of facts and in the same case. The standard is always that care which a prudent man should use under like circumstances. What such reasonable care is, however, does vary in different cases and in the presence of different conditions, and the degree of care required of one, whose breach of duty is very likely to result in serious harm, is greater than when the effect of such breach is not near so threatening. Throwing this coal, some of it at least, consisting of heavy lumps into a tender, with a man walking around in a position where a miscalculation or wild throw was not unlikely to cause great damage, presents a very different proposition and demands a much higher degree of care than the ordinary loading of coal from one vehicle to another. These hands, then, charged with this knowledge and this degree of care, were given the task of throwing the coal from the car across the intervening space into the forward part of the tender. They were not to throw it into the rear of the tender, where the water tank of the engine was placed, which was as high or nearly on a level with the railing of the tender. This was not the place for the coal, and any thrown there was very likely to fall off. The weight of the coal, a hundred pound lump, makes it very probable that one of the hands undertook to throw a lump of coal too large for him. Most likely he undertook it without the shovel, as the size, 20 by 20 inches, would hardly permit that a shovel could be used for the purpose, and, staggering under the weight, he failed to clear the space or control its direction. The piece struck the railing of the tender, or outside and below the rails, and, falling to the side, struck the plaintiff and did the injury. This is not only very probable from the circumstances, but there is direct evidence to this effect. In answer to a question by the defendant, the plaintiff testified: "Q. Do you know whether it struck the tender and fell off? A. That is my information." If this is the way it occurred, and we think it much the most probable inference, it would in our opinion be a negligent act for one of those hands to undertake to throw a lump of coal of that weight across that space, when he must have known the chances were much against his success, and where a failure might cause death or serious injury to a co-employee working near. Indeed, there could hardly be a reasonable suggestion made on the evidence, with the duty incum-

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bent on these men to observe a high degree of care, which would negative the existence of negligence. If they undertook to throw a lump of coal too heavy for them across the space, so heavy that they could not get it over or control its direction—and they must have known, or should have known, this when they lifted the coal—they would be negligent. If they threw the coal, in the first instance, back on the water tank where it was likely to roll off, this would be a negligent act. If they continued to pile coal on the forward part of the tender, where it belonged, till it was even with or above the top of the tender so that the coal was likely to roll off, either directly to the ground or over the tank in the rear, it would be negligence to do this without warning to the plaintiff and giving him an opportunity to be on the lookout. They were in a position to note the condition of the coal, and the plaintiff was not. He was on the ground engaged in the necessary discharge of his duties and bending over in the effort to connect the hose with the hydrant.

While we have thus far made no reference to the doctrine of "*res ipsa loquitur*," for the reason that this doctrine is more usually invoked when nothing but the objective facts attendant upon an injury can be produced, while here, we have the additional evidence, frequently not obtainable, that the agents of the defendant, and for whose conduct the defendant is responsible, by their act caused the injury complained of, we are of opinion that the doctrine applies with full force to the facts of this case. It was suggested for the defendant that "*res ipsa loquitur*" is only applicable in case of the failure of some mechanical appliance or contrivance or machine, which fails in some unusual and unexpected manner to do its work properly, and the default is imputed for negligence to its owner or the employee who is charged with the duty of keeping it in order. But the doctrine is not so confined. Courts of the highest authority have applied it in cases not at all dissimilar to the one before us, and approved text-writers state the principle to like effect. In *Shearman & Redfield on Neg.* § 59, it is said: "In many cases the maxim '*res ipsa loquitur*' applies. The affair speaks for itself. It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury, but, in these cases, the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer, or that it is necessary to offer." In *Hale on Torts*, 482, it is said to apply, "where the thing is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care." And in *Labatt on Master & Servant*, § 843, it is said: "The rationale of this doctrine is that in some cases the very nature of the occurrence may of itself, and through the presumption it carries, supply the

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requisite proof. It is applicable when, under circumstances shown, the accident presumably would not have happened if due care had been exercised. Its essential import is that, on the facts proved, the plaintiff has made out a prima facie case without direct proof of negligence"—citing a large number of instances where the maxim was upheld, as when a piece of coal falls from the tender of a passing train and hits a section hand who is standing a reasonable distance from the track (*Railroad v. Wood* [Tex. Civ. App.] 63 S. W. 164), and where a large piece of coal falls from a tub where it is being hoisted from the hold of a steamer (*Joist v. Webster, Quebec*, 15 C. S. 220).

In *Scott v. Dock Co.*, 3 Hurl. & Colt, the plaintiff proved that, while conducting his duties as custom officer, he was passing in front of a warehouse in the dockyard and was felled to the ground by six bags of sugar falling upon him, and the principle is declared as follows: "There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care. In *Jensen v. The Joseph B. Thomas* (D. C.) 81 Fed. 578, the principle is announced in almost identical words: "The occurrence of an injury may itself, in connection with other circumstances, sufficiently show negligence as to justify a judgment for damages, where the thing causing the injury is under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if ordinary care is used." "And the principle was applied in a case where one of the vessels had set an empty water keg on the loose hatch-covers at the side of the hatch in such a position that an accidental shock or jarring of the covers might let the covers into the hatch while stevedores were working in the hold." See, also, *McCray v. Railway*, 89 Tex. 168, 34 S. W. 95. In this case it was held as follows: "(1) When a servant sues his employer for damages arising from injuries caused by the negligence of the latter, the plaintiff must prove the negligence of the defendant, and proof of the accident and injury alone will not be sufficient to authorize a recovery. But the circumstances attending the injury may, without any direct evidence, be sufficient to establish the fact of negligence. (2) A brakeman, sitting on the side of a car in a train running between stations was killed by a steel rail, part of the load of a car in front of him falling therefrom, one end striking the ground and the other sweeping along side of the train and striking him. Without other proof of negligence in the loading on the car of rails, the circumstances were sufficient to take the case to the jury, and it was error to direct a verdict for the defendant." In *Howser v. Railroad*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, the maxim is held to apply where a plaintiff was walking along a footpath outside of the right of way and

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was injured by a half dozen cross-ties which fell upon him from a gondola car attached to a train passing along the defendant's road. In *Sheridan v. Foley*, 58 N. J. Law, 230, 33 Atl. 484, it is said: "It is urged, however, on behalf of the defendant, that the plaintiff was bound, in order to entitle him to a verdict, to prove affirmatively that the injury which he received was caused by the negligent act of the defendant or of his servants; that the mere proof that the plaintiff was injured by a brick falling from the hod of one of the defendant's hod carriers, or from a scaffolding upon which some of the employees of the defendant were engaged in laying a wall, does not, standing alone, raise any presumption of negligence; and that, as there was no evidence offered to show under what circumstances the brick fell, there was nothing in the case to warrant the jury in inferring that the injury complained of was the result of the carelessness of the defendant or of his employees. While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases, the maxim "*res ipsa loquitur*" is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care." In *Armour v. Golkowska*, 95 Ill. App. 492, it is held: "(1) Where an employee in a packing house, while at work at a table trimming meat, was injured by the fall of an empty barrel from the platform above her, and there is no evidence by way of explanation as to how the barrel came to fall, the doctrine of '*res ipsa loquitur*' applies. (2) When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." See, also, *Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553; *Seybolt v. Railway*, 95 N. Y. 562, 47 Am. Rep. 75; *Lyons v. Rosenthal*, 11 Hun (N. Y.) 46; *Hart's Case*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298; *Byrne v. Brodie*, 2 Hurl. & Colt 721.

These authorities, we think, clearly establish that the maxim of "*res ipsa loquitur*" applies in a case like the one before us. In the ordinary course of things, if these hands had been reasonably attentive to their duty and reasonably observant of proper care, the event would not have occurred. From the fact that it did occur and from the attendant circumstances, and in the absence of any explanation, the inference of negligence was reasonable, and much the most probable, and in such case the order for a nonsuit would have been erroneous. In the well-considered opinion of Mr. Justice Connor, in *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493, it is established and declared that "this principle of '*res ipsa loquitur*,' where it applies, car-

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ries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not we think raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence and say whether upon all the evidence the plaintiff has sustained his allegation." This was the course pursued by the judge below, who charged the jury that the burden was on the plaintiff to show by the greater weight of the evidence that the defendant was negligent and that the negligence was the proximate cause of the injury, explaining the meaning of the terms and further applying the facts as presented, but the burden was placed on the plaintiff throughout. There was no error, therefore, either in refusing the motion for nonsuit or in the charge as given.

Our attention is called to the case of *Raiford v. Railroad*, 130 N. C. 597, 41 S. E. 806, as authority for holding that the facts of the present case present no evidence of actionable negligence. The case, we think, does not sustain the position. In that case a piece of iron fell from an engine, and, taking an eccentric course, struck and seriously injured the plaintiff who was working near the engine. The iron had fallen by reason of a co-worker having previously loosened or removed a nut that held the same in place. The only negligence alleged was the act of the co-employee in unscrewing the nut. There was no testimony showing, or tending to show, that the nut had been improperly or negligently removed, or that any injury was likely to follow, and the occurrence was held to be an excusable accident. In our case the very question is whether the act of the defendant was negligent in throwing the coal, and, as we have endeavored to show, there was ample evidence from the facts and circumstances that those employees must have been or very probably were negligent, or the event would not have followed. There are cases in other jurisdictions which appear to conflict with the decision here made, but a careful examination will disclose that most of them can be distinguished and upheld on grounds entirely consistent with the principles declared in the present opinion. And where this cannot be done, we think these decisions are not in accord with the great weight of authority in cases of this character.

There is no error and the judgment below is affirmed.

WALKER, J., concurs in result.

SUTTLE v. CHOCTAW, O. & G. R. Co.

(Circuit Court of Appeals, Eighth Circuit, March 16, 1906.)

[144 Fed. Rep. 668.]

Master and Servant—Injury of Servant—Assumed Risk.*—Plaintiff's intestate was a switchman in the yards of defendant railroad company, and was directed in the nighttime to uncouple a caboose from the car ahead in a train. Both cars were equipped with safety couplers, as required by law, and the caboose had a platform across the front end, by means of which a person could pass from one side of the train to the other. The lever of the coupler on the side on which plaintiff's intestate then stood was disconnected, and, instead of crossing to the other side where the lever could have been used, or going upon the platform where he could have reached and drawn the pin in safety, he went between the cars, which were then moving slowly, and, while there, stumbled and was run over and killed. Held, that having selected the more dangerous way of performing his duty, when a safe way was within his choice and known to him, he assumed the risk, and that there could be no recovery for his death.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Sam R. Chew, for plaintiff in error.

Thomas S. Buzbee (*E. B. Pierce*, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Plaintiff's intestate was a switchman in the employ of defendant railroad company, and was, on November 15, 1903, engaged in the performance of his duties in defendant's yards in Booneville, Ark. He was directed to uncouple a caboose from a train of freight cars preparatory to switching it upon a side track. The east end of the caboose, and the west end of the box car to which it was coupled, were equipped with coupling devices, as required by Act Cong. March 2, 1893, c. 196, § 4, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; but at the time in question the lever on the south side of the caboose was temporarily disconnected from the coupling pin, so that it did not operate. The lever on the north side of the box car was in good working condition. These cars could ordinarily be coupled or uncoupled by operating either of the levers. When plaintiff's intestate was directed to uncouple the caboose, he was on the south side of the train, which was then standing still. The east end of the caboose was furnished with the ordinary platform for passage from one side to the other. He passed over this platform, turned a switch, and returned to the south side. The train had then started and was moving at a slow rate of four to six miles per hour. There is no evidence of any unusual haste or emergency. Plaintiff's intestate, either knowing

*See foot-note appended to *Illinois Cent. R. Co. v. Swift* (Ill.), 17 R. R. R. 537, 40 Am. & Eng. R. Cas., N. S., 537.

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before, or then ascertaining, that the lever on the south side of the caboose did not operate the coupling pin, went between the caboose and neighboring box car while the train was moving, as just stated; for the purpose of lifting the coupling pin with his fingers and thereby disconnecting the two cars. This was in the nighttime. While doing this he stumbled and fell and was run over by the train.

The evidence discloses that there were other safe and practicable methods open to plaintiff for uncoupling the cars. On receiving his orders, he being on the south side, crossed the platform to the north side, turned the switch, and returned to the south side. He might, as he had just done, have stepped across the platform and made use of the lever on the box car. He might have sat on the platform and safely reached over and drawn the pin with his hands. He might have given a signal and had the train stopped for the purpose of safely disconnecting the cars. Moreover, he might, as he should have done, declined to expose himself to danger by unnecessarily going between the two cars in the nighttime, while they were in motion.

The foregoing facts are practically undisputed, and are substantially the same as have been twice expressly passed upon by this court.

In *Morris v. Duluth, S. S. & A. Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661, the facts as stated are that:

"The crew was engaged in placing the rear one of two cars which were attached to an engine upon the side track. The plaintiff had turned the switch to permit this train to back in upon the side track. His subordinate brakeman was riding the train, and it was necessary to uncouple the rear car, so that it could be left upon the side track. There were two levers, one on each side of this train, provided by the company for the purpose of enabling the brakeman to pull the pin between these cars and to uncouple them without incurring the risk and danger of stepping between them for that purpose. The machinery attached to the lever on the plaintiff's side of the train was out of order, so that he could not pull the pin by means of that lever. But the machinery attached to the lever on the opposite side of the train was in working condition, and he could have drawn the pin himself, or could have caused his subordinate to draw it by use of this lever. Notwithstanding this fact, he stepped in between the two cars in the dark, while they were moving about four miles an hour, undertook to pull the pin with his hands, and by this indiscretion induced his injury."

The facts of that case present a striking parallelism to the case now under consideration. After stating the foregoing facts, the court, speaking by Judge Sanborn, disposed of that case thus:

"When there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of the injury which its

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use entails. [Citing cases.] * * * The plaintiff knew that he could draw the pin and uncouple these cars in safety by the use of the lever on the opposite side of his train, but he chose to incur the risk and danger of walking between the moving cars and of attempting to draw the pin with his hands."

To the same effect is the case of *Gilbert v. Burlington, C. R. & N. Co.*, 128 Fed. 529, 63 C. C. A. 27, wherein Judge Thayer, in a separate concurring opinion, uses the following language:

"I think that the act of Congress, which was passed for the protection of brakemen, amounts to a legislative declaration that a brakeman ought not to step in between the rails to uncouple a car in a moving train; and when it appears that a brakeman has placed himself in such a situation unnecessarily, not being compelled to do so by stress of circumstances, and receives an injury, he is guilty of such negligence as prevents a recovery."

The case before us is governed by the principles laid down in those cases, and on their authority the judgment of the court below directing a verdict for the defendant must be affirmed, and it is so ordered.

ST. LOUIS SOUTHWESTERN RY. CO. v. HARVEY.

(Circuit Court of Appeals, Eighth Circuit, March 19, 1906.)

[144 Fed. Rep. 806.]

Master and Servant—Negligence—Acts of Servant Must Be within Scope of His Employment and in the Business of Master in Order to Charge Latter.*—Two indispensable conditions of the liability of a master for the negligent acts of a servant are that they shall be within the scope of the latter's employment and that they shall be done in conducting the business of the master. If a servant step aside from the business of his master for never so short a time to do an act that is not a part of that business, the relation of master and servant is for the time suspended, and the acts of the servant during this interval are not the master's but his own.

Same—Liability of Master Not Created by Servant's Use of His Facilities without His Consent.*—The use by a servant, in the commission of a tortious act and while pursuing his own affairs, of cars, engines, or facilities of the master, without the latter's consent, but which the servant could not have procured in the absence of the relation of master and servant, is insufficient to charge the master with liability for the acts of the servant.

Same—Facts—Decision.—A straw boss and some members of a gang of laborers, which was engaged in surfacing and repairing track, took a hand car and drove it to town about three miles south of their place of work and camp at about four in the afternoon. About eight in the evening some members of another gang, which was engaged in

*For the authorities in this series on the question the master's liability for the negligence or torts of his servant depends upon whether they occurred while the servant was acting within the scope of his employment, see foot-notes appended to *Sharp v. Erie R. Co.* (N. Y.), 19 R. R. R. 683, 42 Am. & Eng. R. Cas., N. S., 683; foot-notes appended to *Palos Coal & Coke Co. v. Benson* (Ala.), 19 R. R. R. 185, 42 Am. & Eng. R. Cas., N. S., 185.

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relaying the track near the place of work of the former gang, were taking some sick workmen to the town upon a hand car, when they collided with the first car which was returning without any light upon it. The rules and practice of the company prohibited the allowance of a hand car upon the track, without the permission of a foreman, but the men sometimes used them without his knowledge. The working hours of the men ceased at six in the afternoon. The foreman of the men on the dark car testified that they were not engaged in the business of the master, and that the hand car was not on the track with his knowledge or consent after six in the evening. Held, the acts of the men on the dark car after their hours of work had ceased were not within the scope of their employment, nor in the business of the company, and the latter was not liable for them.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

W. T. Woolridge (*S. H. West* and *F. G. Bridges*, on the brief), for plaintiff in error.

Trimble, Robinson & Trimble, and *J. H. Harrod*, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. On March 3, 1903, two gangs of laborers were at work for the St. Louis Southwestern Railway Company, the defendant below, at a point about three miles north of Jonesboro in the state of Arkansas. The plaintiff below, Sam J. Harvey, was a member of a gang which was engaged in taking up old rails and laying new ones and the foreman of his gang was one Redding. The other gang was engaged in surfacing and repairing the roadbed about a quarter of a mile north of Redding's gang, and W. J. Bridges was its foreman. The hours of work for the men in these gangs were from 7 in the morning until 6 in the evening. It was contrary to the rules and practice of the company to permit a hand car upon the railroad track without the permission of a foreman. About four in the afternoon a hand car operated by a straw boss or assistant foreman and some members of Bridges' gang passed south towards Jonesboro. After the men in Redding's gang had completed their work for the day, and about 8 in the evening their foreman sent the plaintiff and four or five other laborers in charge of an assistant foreman upon a hand car to Jonesboro to carry some sick workmen. The plaintiff was in charge of a red light and a white light upon the front of the hand car. He placed the red light on the car, sat down by the side of it, hung his feet over the front end of the car and held the white light upon one of his legs. The evening was dark and at a point about two miles north of Jonesboro they collided with the hand car in possession of the members of Bridges' gang which was coming north without any light upon it and the plaintiff's legs were caught between the cars and seriously injured. He brought this action against the company to recover damages upon the ground that he was injured by the negligence of those members of Bridges' gang who were

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operating the dark car. At the close of the evidence counsel for the defendant requested the court to instruct the jury to return a verdict in its favor. This request was refused, and this refusal is assigned as error.

Conceding, without considering or deciding the question, that the men upon the dark car belonged to the classes of servants for whose acts of negligence the master is liable under the statutes of Arkansas, the burden of proof was upon the plaintiff to establish the fact that at the time and place of the collision these men were running the car in their possession in the discharge of a duty of their employment as servants of the corporation. The first question for consideration in the case, therefore is, was there any substantial evidence at the trial sufficient to sustain a finding of the jury that this fact existed? It is not enough that there was evidence that these men were engaged in the business of the corporation during their working hours or at other times or places, but it was necessary to produce evidence that they were thus employed at the time and place of the collision. The finding of this fact required an affirmative answer to two questions which conditioned it, was there substantial evidence that the act of operating this car upon the railroad upon its northward trip from Jonesboro in the dark at 8 o'clock in the evening was within the scope of the duty assigned to these men under their employment? for if it was not the master was not liable for their acts in that regard although those acts were done during the time of their engagement about the business of their master. *Bowen v. Illinois Central R. Co.* (C. C. A.) 136 Fed. 306, 311-316, wherein a station agent while delivering a package at the window of his office shot the addressee, and the company was held to be exempt from liability because the act was not within the scope of his duty; *Walker v. Ry. Co.*, 121 Mo. 575, 584-588, 26 S. W. 360, 24 L. R. A. 363, 42 Am. St. Rep. 547. The second query is, was there substantial evidence that the act of running this car upon the track at night without a light was done in the conduct of any of the business of the master? for if a servant step aside from the business of his master for never so short a time to do any act that is not a part of that business the relation of master and servant is for the time suspended and the acts of the servant during that interval are not his master's, but his own. *Benson v. Chicago, St. P., M. & O. Ry. Co.*, 78 Minn. 303, 307, 308, 80 N. W. 1050; *Baker v. Kinsey*, 38 Cal. 631, 633, 99 Am. Dec. 438; *Georgia Railroad Co. v. Wood*, 94 Ga. 126, 21 S. E. 288, 47 Am. St. Rep. 146.

Nor does the fact that servants guilty of a tortious act make use of the master's cars, engines, or other facilities, which they could not have obtained in the absence of the relation of master and servant, to commit it, while pursuing their own ends exclusively, charge the master with liability for their act in the absence of his knowledge or consent to such use. *Chicago, St. P. M. & O. Ry. Co. v. Bryant*, 65 Fed. 969, 973-975, 13 C. C. A. 249, 253-255, where a yardmaster took an engine and a passenger

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car upon the track of the railroad company at night after his hours of labor were over without the knowledge of his master, and caused a collision which killed some and injured others of those he was transporting for his and their purposes (*Mitchell v. Crassweller*, 13 C. B. 237); in which a carman whose duty it was to put the horses and cart of his master in his stable after the day's work was completed obtained the keys of the stable for that purpose, and then drove in another direction on his own business without the consent of his master, and on his return drove his master's horse and cart against, and injured a third person. The master was held to be exempt from liability for this injury (*Cousins v. Railway Co.*, 66 Mo. 572); wherein the superintendent of the company took an idle locomotive from its round-house in the night and ran it 2½ miles for a doctor for a sick neighbor. On the way he carelessly drove the engine upon, and killed the plaintiff's mule, but the Supreme Court of Missouri held that the company was not liable for the damage. *Morier v. Railway Co.*, 31 Minn. 351-353, 17 N. W. 952, 47 Am. Rep. 793; *Campbell v. City of Providence*, 9 R. I. 262; *Garretzen v. Duenckel*, 50 Mo. 104, 107, 111, 11 Am. Rep. 405; *Chicago Consol. Bottling Co. v. McGinnis*, 86 Ill. App. 38, 40; *Snyder v. Railway Co.*, 60 Mo. 413, 419.

The evidence upon the questions whether or not the men upon the dark car were running north from Jonesboro at 8 in the evening with the consent of their master, within the scope of their employment, and in the business of their employer, was this: The plaintiff's witnesses testified that hand cars were not allowed upon the railroad track without the permission of the foremen, but that the men sometimes took and used them without their knowledge, that the hours of work of Bridges' gang were from 7 in the morning until 6 in the evening, that about 4 in the afternoon a straw boss and some men of his gang went to Jonesboro with a hand car, that the work in which Bridges' gang was engaged was surfacing the track, that the witnesses for the plaintiff did not know whether the men who used this car were then working for the company or not, and that the cars collided at 8 in the evening when the car with Redding's men was going south to carry some sick workmen, and the other car was coming north without any light upon it. Bridges testified that he had 19 men in his gang, and that some of them were not at work on the day of the accident, that he had four hand cars, and was using three; that he sometimes sent men on a hand car to Jonesboro to get tools, but whenever he did so he sent them at such times that they could come back to his camp by 6 in the afternoon; that he might have sent a car to Jonesboro on the day of the accident, but that if he had done so the men with it would have returned by 6 o'clock, that if he had sent them and they had not returned by 6 they would not have been in the service of the company thereafter during that night; that he sent no car, and gave no permission for any car to go to Jonesboro on that day, and that if one went, it was without his knowledge or con-

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sent; that he knows he did not send a car to Jonesboro that day for tools, because his tools were sent to him at the camp; that he heard of the collision and injury the next day; that he does not remember sending out any car, or permitting any car to go to Jonesboro on that day, and that if he had sent a car, or had permitted one to go he would certainly have remembered it the next day after he heard of the accident. There is no other material evidence in the case upon these issues, and this testimony is insufficient to sustain a finding that the men on the dark car were either acting within the scope of their employment or transacting the business of the defendant at 8 in the evening when they were returning from Jonesboro and caused this collision. The scope of the duties of their employment was *prima facie* limited to surfacing and repairing the railroad track. The time of their engagement was from 7 in the morning until 6 in the evening. After the latter hour, and while they were not surfacing the track, they were presumptively without the service of their master, pursuing their own affairs exclusively. The facts that they could not have had possession of the hand car without the consent of the foreman, Bridges, or a violation of the rules of the company, and that Bridges might have sent them to Jonesboro for tools at 4 in the afternoon, are insufficient to overcome these presumptions, the fact, so suggestive of surreptitious use of the car, that they were running it in the night without lights, and the positive testimony of Bridges, the only witness in the case who knew that this car was not out after 6 on that evening with his knowledge or consent, and that if these men were operating it after that hour they were not then engaged in any part of the business of the company, but were attending to their own affairs exclusively. The insufficiency of the evidence upon these issues is fatal to the verdict, and renders the consideration of other questions in the case unnecessary.

The judgment below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to grant a new trial.

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(Circuit Court of Appeals, Sixth Circuit, January 19, 1906.)

[142 Fed. Rep. 682.]

Master and Servant—Railroads—Fellow Servants under Ohio Statutes.*—87 Ohio Laws, p. 150, § 3, in providing that every person in

*For the authorities in this series on the subject of the different department limitation of the fellow-servant rule, see foot-notes appended to *Louisville & N. R. Co. v. Martin* (Tenn.), 18 R. R. R. 413, 41 Am. & Eng. R. Cas., N. S., 413; foot-notes appended to *Conine v. Olympia Logging Co.* (Wash.), 15 R. R. R. 387, 38 Am. & Eng. R. Cas., N. S., 387.

For the authorities in this series on the question whether trainmen of different trains are fellow servants, see foot-notes appended to

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the employ of a railroad company "having charge or control of employees in any separate branch or department shall be held to be the superior and not fellow servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed," divides all the employees of a railroad company, with respect to those working in separate branches or departments constructively, into superiors and subordinates; superiors being all those having authority over any co-employee whatever, and subordinates those having none. And under the decisions of the Supreme Court of the state that separate trains are separate "branches or departments," within the meaning of the statute, a company is liable for the injury or death of a fireman through the negligence of the engineer of another train having authority over his own fireman, although he is himself subject to the control of the conductor of his train.

Same—Action for Death of Fireman—Contributory Negligence.†—Plaintiff's intestate, who was a fireman on an engine on defendant's railroad, was killed while his train was in the yards of the company, as the result of a collision alleged to have been caused by the negligence of the engineer of another train. Deceased was at the time standing on the running board on the front of his engine cleaning the headlight or number plate, and the engine was backing very slowly, drawing a number of cars after it. It was a part of his duty to clean the engine, and it was clearly shown that it was the custom of firemen on defendant's road to do so during the day, sometimes while the engines were standing still, and sometimes while they were in motion, and that such custom was known to and sanctioned by the company, although a rule provided that firemen should clean the engines "at the end of each trip." Held that, in view of such general custom, which in effect abrogated the rule, the deceased could not be said as matter of law to have been guilty of contributory negligence in being in the position where he was at the time of the collision, but that such question was one for the jury.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

See 133 Fed. 681.

George F. Arrel and *T. McNamara*, for plaintiff in error.
John H. Clarke, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover damages for the wrongful death of the plaintiff's intestate, Thomas M. Kane, a fireman on one of two trains which were being switched in the yards of the defendant railway company at Niles, Ohio. Kane was killed in a collision charged to have resulted from the negligence of one Bowker, the engineer of the other train. Bow-

Crosby v. Lehigh Valley R. Co. (C. C. A.), 18 R. R. R. 426, 41 Am. & Eng. R. Cas., N. S., 426; *Driver's Adm'r v. Southern Ry. Co.* (Va.), 18 R. R. R. 11, 41 Am. & Eng. R. Cas., N. S., 11.

For the authorities in this series on the question whether an engineer is a vice principal or fellow servant with respect to other employees of his company, see foot-note appended to *Peterson v. New York, etc., R. Co.* (Conn.), 15 R. R. R. 772, 38 Am. & Eng. R. Cas., N. S., 772.

†For the authorities in this series on the subject of the waiver of rules made for the guidance and protection of railroad employees, see foot-notes appended to *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 15 R. R. R. 621, 38 Am. & Eng. R. Cas., N. S., 621.

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ker's train had a conductor, although, at the time of the collision, he was not on the train, but in the telegraph office. The suit could not have been maintained under the Ohio law as it stood prior to the passage of the act of April 2, 1890 (87 Ohio Laws, p. 149), for then the negligence relied on would have been held that of a fellow servant, for which the company was not liable. *P., Ft. W. & C. Ry. Co. v. Devinney*, 17 Ohio St. 198. It is therefore based upon this act, and has involved both its constitutionality and construction.

This makes the third time the case has been before this court. On the first trial, a judgment was recovered for the plaintiff, which was reversed by this court for the reasons stated in the opinion delivered by Judge Cochran (118 Fed. 223, 55 C. C. A. 129), being, in brief, that on the record it appeared that Kane had been guilty of contributory negligence. The construction and application of the act, while discussed, was left undetermined, awaiting the proof on the next trial. On the second trial, objection to the introduction of any testimony was sustained, on the ground that the act violates the Constitution of Ohio. This judgment we reversed, holding the act to be constitutional, and remanded the case for a third trial. 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788. On the last trial, Judge Cochran, who sat below, directed a verdict for the defendant on two grounds: First, that the act of April 2, 1890, does not apply, because Bowker, the negligent engineer, while in control of his fireman, was not in charge of all the employees on the train, there being a conductor; and, second, because Kane, the deceased fireman, was guilty of contributory negligence in putting himself in a dangerous place on the engine, in front of the boiler, between it and the gondola car, where he was liable to be caught if a collision occurred. The case is here for a review of these rulings.

1. Prior to the passage of the act of April 2, 1890, the general rule that a railroad company is not responsible to an employee for the negligence of a fellow servant was subject in Ohio to the modification, first announced in the *Stevens Case*, 20 Ohio, 416, and confirmed in the *Keary Case*, 3 Ohio St. 201, that, where one employee is put under control of another, and the subordinate, without fault on his part, is injured through the negligence of the superior, while both are acting in the common service, the company is liable. Thus the actual relation of the negligent to the injured employee was held to determine the liability of the company. If the negligent employee was in control of the injured one, the company was deemed liable, because then the two were not properly fellow servants, but one the superior of the other, and as Judge Ranney said in the *Keary Case*, 3 Ohio St. 211:

"No service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other."

Recognizing the relation of superior and subordinate as a

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source of liability, the act under consideration not only gives it statutory force, but broadens the liability of the company by creating as between separate branches or departments a class of constructive superiors and subordinates, who are no longer to be deemed fellow servants. It provides (section 3, p. 150) that in all actions against a railroad company for personal injury or wrongful death, it shall be held, "in addition to the liability now existing by law":

"(1) That every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not a fellow servant but superior of such other employee; and

"(2) Also, that every person in the employ of such company having charge or control of employees in any separate branch or department, shall be held to be the superior and not fellow servant of employees in any other branch or department, who have no power to direct or control in the branch or department in which they are employed."

In sustaining the constitutionality of this act, we commented upon the ground of classification thus adopted by the Legislature, and said (133 Fed. 681, 67 C. C. A. 657, 68 L. R. A. 788):

"The exercise of authority by one employee over another is thus made the test. Any employee who exercises authority over another is 'not the fellow servant, but superior,' of such other, and every employee who exercises authority over another in his own branch or department is the 'superior, and not fellow servant,' of an employee in a separate branch or department who exercises no authority there. If the negligent employee is, by virtue of this enactment, the superior and not fellow servant of the injured employee, the latter did not assume the risk of his negligence, and the company is responsible. It is to be observed that the basis of the new classification made by the legislature is none other than that of the old made by the Supreme Court of Ohio. The class is merely broadened by a logical extension of the rule. Under the old, the company was liable for the negligence of one who exercised authority over the employee injured through his negligence (*B. & O. R. R. Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233, 243); under the new, it is liable not only for the negligence of one who exercises authority over the employee injured, but of one who, exercising authority in one branch or department, by his negligence causes the injury of an employee in another who exercises no authority there."

But the court below, after a careful analysis of the act and the cases under it, reached the conclusion that the constructive class of superiors created by the second clause is limited to employees in charge and control of separate branches and departments; in other words, to be a superior under this clause, the employee must be in charge and control of all employees in his separate branch or department. The possibility of this construction was suggested in the opinion of this court, delivered by Judge Coch-

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ran, when the case was first before it, but the question was left undecided. 118 Fed. 223, 55 C. C. A. 134. The question is a nice one, and we regret it has not been directly determined by the Supreme Court of Ohio, the proper tribunal to construe an Ohio statute. We shall give it, however, our best judgment.

The Ohio rule laid down in the Stevens and Keary Cases contemplated a common employment wherein the superior was in charge or control of the subordinate. The rule obviously could not apply in the case of separate branches or departments, whatever the relative position of the employees in such branches or departments. Counting separate trains as separate branches or departments, a brakeman on one train could not be held the subordinate of a conductor on another train, or the latter the superior of the former. Through this resulted what was charged in the dissent to be the injustice of the holding in *P., Ft. W. & C. Ry. Co. v. Devinney*, 17 Ohio St. 198, where a brakeman, injured by the negligence of the conductor of a separate train, was held to have no right to recover, although he might have maintained an action if he had been hurt through the negligence of the conductor of his own train. The framers of the act may have had in mind this decision.

Coming to the act itself, the meaning of the first clause is plain. It states the Ohio doctrine of superior and subordinate. Every employee actually having authority to direct or control any other employee is not the fellow servant, but superior, of such other employee. To be such superior, it is not necessary that the employee shall have authority to direct or control more than the one employee who is made his subordinate. He does not have to be in control of a branch or department, or represent the company as a vice principal. The simple relation of superior and subordinate between the two is all that is required; but that is required, and, if absent, the rule does not apply. Thus, an engineer is not the superior of a brakeman, when both are employed on the same train, although the engineer is the superior of his fireman, and the brakeman is the superior of no one. *Railway Co. v. Lewis*, 33 Ohio St. 196; *Railway Co. v. Shanower*, 70 Ohio St. 166, 71 N. E. 279.

Coming to the second clause, three things are involved, a separate branch or department, a superior therein, and a subordinate in another branch or department. A "branch" or "department" is not defined, but, as held in the Margrat Case, 51 Ohio St. 130, 144, 37 N. E. 11, the terms evidently refer to the small divisions which separate the employees from one another while at work, and in this sense a train is a separate branch or department. A subordinate is an employee who has no power to direct or control in the branch or department in which he is employed. A superior in a separate branch or department, for whose negligence the company is liable, is an employee "having charge or control of employees in any separate branch or department." The statute does not provide, as it easily might have

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done, that to be a superior the employee must have charge or control of the separate branch or department, or of all the employees therein, but simply of employees therein; that is, as construed in the Margrat Case, of any employee therein. 51 Ohio St. 144, 37 N. E. 11.

Thus the Legislature divided all the employees of a railway company, working in separate branches and departments, into superiors and subordinates; superiors being all those having some authority, and subordinates those having none. The line of distinction is clear. As between separate branches or departments, the company is only liable for the negligence of superiors, and only responsible for injuries done to subordinates. If a subordinate is given charge or control of a co-employee, he ceases to be a subordinate; but, according to the court below, he does not become a "superior," unless he is given charge or control of all the employees in the particular branch or department. Certainly, under the first clause, he becomes the actual superior of the employee under him, and the company is liable if the latter is injured through his negligence, and we think he also becomes the constructive superior of all employees in separate branches or departments who exercise no authority there. If one of them is hurt through his negligence, in our opinion the company is liable. In this connection, it is to be noted that, while an employee may be the constructive superior of all the subordinates in separate branches and departments, he is not the constructive superior of any subordinate in his own department, and is the actual superior only of those he really directs and controls.

This construction seems to us to be sustained by the cases decided, although the precise point was not raised. In the Margrat Case, 51 Ohio St. 130, 37 N. E. 11, a brakeman was injured by the negligence of the engineer of another train. It is true it is not stated there was a conductor on that train. Probably there was not. The court apparently gave no consideration to the question whether there was or was not. It did not consider whether the engineer was or was not in charge of the train. It did consider and determine that the train was a separate branch or department, and then took up the question whether the engineer had charge or control of any employee in such separate branch or department. It was conceded the engineer had charge of the engine and of the fireman thereon, and the court held this was sufficient. It was not necessary that he should have control of more than one employee. To have control of "any co-employee whatever" (page 144, 51 Ohio St., page 11, 37 N. E.) was enough. Respecting the relation of superior and subordinate, created by the statute, the court says (page 144, 51 Ohio St., page 14, 37 N. E.):

"But the statute, we think, declares that relation to exist, as a matter of law for the purpose of charging the company, if the engineer was the superior of—that is, was authorized to command or direct—any co-employee whatever, and Margrat was without such authority."

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And the syllabus, which is authoritative in Ohio, holds:

"1. An engineer, in charge of a locomotive on one train of cars of a railroad company, is in a branch or department of its service separate from that of a brakeman on another train of the same company, within the meaning of the terms 'separate branch or department,' as those terms are employed in section 3, of the act of April 2, 1890 (87 Ohio Laws, p. 150.)

"2. An engineer in charge of a locomotive, who has authority to direct or control a fireman serving on the same locomotive is a 'superior,' within the meaning of the above-mentioned section."

According to the court below, what the Supreme Court held in this case was that an engineer, who, in the absence of a conductor, is in charge of a train of cars, whether consisting of an engine running light, or an engine and cars, is a "superior," within the meaning of the act. If the court meant this, why not say so? The syllabus does not describe the engineer as being in charge of the train, but of the locomotive, with authority to direct or control the fireman serving thereon. This makes him a superior. Obviously, the court had in mind not the control of the train, but only of the fireman. It was not the control of a department, but of some employee therein, which was determinative. Just as, under the old Ohio rule, an employee in charge of another was held to be his superior, for whose negligence the company was responsible, regardless of whether or not he was in charge of a department or otherwise a vice principal.

In the case of *L. S. & M. S. Ry. v. Pero*, 22 Ohio Cir. Ct. R. 130, the plaintiff's intestate was a switchman at work in the Toledo yards of the railroad company. He was run down and killed by a yard engine, carrying both an engineer and conductor. It was charged that both the conductor and the engineer were negligent in failing to give proper signals. Suit was brought under this act. It was conceded that Pero was a subordinate, and it was claimed that the engineer and conductor were superiors, within the meaning of the statute. The question of negligence was submitted to the jury, and there was a verdict and judgment against the railway company. The Circuit Court affirmed the judgment in an opinion delivered by Judge Haynes. In this opinion, after discussing the evidence tending to show that Pero was in a separate department, the court says that for any negligence of the conductor the company would be liable, and for any negligence of the engineer on the engine the company would be liable. "We think the facts tend to show very strongly that there was negligence, both on the part of the conductor and of the engineer. At any rate this was the question that was submitted to the jury." Page 134. This case was carried to the Supreme Court, and the judgment affirmed. *Railway Co. v. Pero*, 65 Ohio St. 608, 63 N. E. 1132. But it is said that, since the jury could have based their verdict on the negligence of the conductor, we are at liberty to say the Supreme

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Court affirmed it for that reason. With this we disagree. The rule is quite different. If the jury under the instructions might have based its verdict upon the negligence of the engineer, then, before affirming the judgment, it was necessary to hold that the company was liable for the negligence of the engineer. Such was the holding in *Railroad Co. v. Keary*, 3 Ohio St. 202, where Judge Ranney, speaking for the court, and referring to the *Stevens Case*, 20 Ohio, 416, said (page 204):

"In that case, as in this, it was left in doubt whether the negligence complained of, and upon which the jury found their verdict, was that of the superintendent or conductor. In this case as in that, it is necessary to find the company liable for the negligence or carelessness of both the superintendent and conductor, before the judgment can be affirmed, as the instruction covered both, and it cannot now be told upon which the carelessness and negligence was fixed by the evidence."

We are satisfied, from the action of the Supreme Court of Ohio in these two cases, that it would construe the statute as we do, not as requiring an employee to be in charge or control of a separate branch or department, and of all the employees therein, in order to constitute a constructive "superior" within the meaning of the statute, but only to be in charge or control of another employee, or as the court put it, "any co-employee whatever," in such branch or department. This construction, we think, not only simplifies the act and contributes to its coherence, but will facilitate its proper enforcement by making plain its requirements. It is much easier to prove that an employee is in control of another employee, than that he is in control of all the employees in a particular branch or department, for it is not necessary to place a branch or department in control of a single employee. Take the case of a train. The control of the employees thereon might by rule be readily distributed among several employees, so that, while each might have control of one or more, neither would have control of all, and so the train could be put in the singular situation of having several actual but no constructive superiors aboard.

2. Kane was hurt while cleaning his locomotive. It was then about half past 6 o'clock in the morning. He had gone on duty at 6. The locomotive was backing slowly, drawing after it 10 or 12 cars; that next the engine being a gondola. The engineer stated that the train was "just merely going," it had "just about come to a stop." A witness for the defense estimated its speed at about three miles an hour. When the collision occurred, Kane was standing on the front part of the engine, wiping the number plate of the headlight with a piece of waste, which he held in his left hand. The engine had no pilot, but what is called a bunting beam, having underneath a footboard, and on top a hand rail. There was also a hand rail running around the boiler from the cab on one side to the cab on the other, high enough above the running board to afford a good hold. The evidence was conflicting as to

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precisely where Kane was standing when the collision occurred. Baldwin, a witness for the defendant, put him on the bunting beam directly in front of the boiler, and says he was wiping the headlight. Rhiel, a witness for the plaintiff, says he was standing on one end of the bunting beam, holding to the hand rail along the boiler with his right hand, while his left was wiping either the end of the boiler or the headlight; he was facing the engine. Other witnesses testified that he could not stand directly in front of the headlight without standing on the round hand rail above the bunting beam; that the natural place for him to stand was to one side, holding to the hand rail along the boiler. Bowker's train was running at a speed of about 10 miles an hour when it struck the tender of the engine on which Kane was working. The tender and engine was forced back, and the body of the gondola was torn from the draft timbers and shot up against the front of the engine, breaking the number plate and headlight. In some way Kane was thrown off or caught. He was found dead lying on the draft timbers of the gondola, crossways of the track. A bolt had apparently been driven through his back.

On the first trial, the following rule respecting firemen was in evidence :

"They must report for duty at the appointed times; attend to the fires of the locomotive when on the road, and to taking water and oiling the machinery; assist engineman in watching for signals and obstructions, clean and polish their locomotives at the end of each trip, and assist in making repairs when necessary."

The reversal of the judgment on the first trial, and the holding that the record showed a case of contributory negligence, was based not simply on the fact that the evidence showed that Kane was in a dangerous place, but was there in violation of the above rule in two respects: He was cleaning the locomotive, not at the end of the trip, but while it was in motion, and he was not assisting the engineer in watching for signals and obstructions, a thing he ought to have been doing. The court held that he was guilty of contributory negligence in being in a dangerous place in violation of a rule of the company; that, if he had been at his post of duty, in the cab of the engine, watching for signals and obstructions, the collision would not have caught him.

The court below could see no substantial difference in the case presented on the last trial from that on the first, and therefore naturally felt bound by the former ruling. But we find a material difference resulting from the elimination of the rule. On the last trial, there was evidence to justify a finding that the rule in question, so far as it required the locomotive to be cleaned only at the end of each trip, had been abrogated in accordance with the doctrine of *Railway Co. v. Craig*, 73 Fed. 642, 19 C. C. A. 631; *Id.*, 80 Fed. 488, 25 C. C. A. 585. The evidence was overwhelming to the effect that the firemen of this company at the time of the accident worked from 6 in the morning to 6 at

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night, and always cleaned their engines during the day, sometimes while they were standing still and sometimes while in motion; and that this custom was known to and sanctioned by the company. In cleaning his engine at the time he did, Kane was therefore only doing his work under the modified rule. Being in the discharge of his duty, he was where he had a right to be, and was not violating the rule requiring him to look out for signals and obstructions. That part of the rule had no more application to him when at work cleaning the engine than when at work shoveling coal into the firebox. Besides, it may be said in this connection there was testimony tending to show that Kane was standing on the end of the bunting beam facing the cab window, through which he had a view of the track ahead and could thus assist the engineer in watching for signals and obstructions. Moreover, the collision did not result from any failure to watch for or observe either a signal or an obstruction. It resulted from the sudden and unexpected negligence of Bowker—a thing which could neither have been foreseen nor prevented.

With the rule out of the way, the Jones Case, 95 U. S. 439, 24 L. Ed. 506, and Kresanowski Case (C. C.) 18 Fed. 229, cease to apply. In those cases the injured persons seated themselves on the pilots of the engines which were running head on—an extremely dangerous place under the circumstances. And they did this without reasonable cause or excuse. When Kane went out on the running board to clean the engine, it had almost stopped. He was in no more danger than he would have been on the rear of the tender if the gondola had been coupled to it, or than a brakeman, standing on the front end of the gondola, would have been. Any place where there is a coupling is dangerous in case of a collision, but how dangerous, and whether a fireman or brakeman of ordinary prudence should and would avoid such a place while his train was moving slowly and just about to stop, is, we think, a question for the jury under all the circumstances of the particular case. With the rule practically out of the way, it seems to us, in view of the conflict of evidence, that the question whether Kane was or was not guilty of negligence in being where he was, and doing what he did, should have been submitted to the jury under proper instructions. It was peculiarly a question for such a body to pass on.

If it be said that, in our first opinion, we stated that, irrespective of the rule, Kane was in a dangerous position, and therefore was negligent, it will be seen, upon a careful reading, that we held the Jones and Kresanowski cases applicable, because Kane had no reasonable occasion for being where he was. We said (118 Fed. 223, 55 C. C. A. 138):

“It would seem it was negligence for the defendant to be where he was, because of the great danger of that position, and the absence of reasonable occasion for his being there.”

And on page 139, 55 C. C. A., page 232, 118 Fed.:

“But, as we have seen, the work was not required or even

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authorized, and his being there was therefore entirely without reasonable occasion for it."

But, under the modified rule, the work of cleaning the engine was authorized, and there was therefore reasonable occasion for his being where he was. It does not seem to us just that the railroad company, while it sanctions the practice of its firemen in cleaning their engines under such circumstances as existed here, should be permitted to say it was necessarily dangerous, and that a fireman in pursuing that practice is, as matter of law, guilty of contributory negligence.

The judgment is reversed, and the case remanded, for further proceedings not inconsistent with this opinion.

IVES v. WISCONSIN CENT. RY. CO.

(Supreme Court of Wisconsin, May 8, 1906.)

[107 N. W. Rep. 452.]

Master and Servant—Injuries to Servant—Assumption of Risk—Railroads.*—That a train was running within city limits at a speed greater than that allowed by law did not relieve a section man from the rule that section men on railroads assume the risk of trains of all sorts, regular or wild, running over the tracks at all times and at such speeds as are attainable, without notice or warning except such as results from the noises of the train including customary signals.

Same.—That a train by which a sectionman was struck and killed was running at an unusual rate of speed in the place where the accident occurred, does not relieve the sectionman of the assumption of risk of injury from trains.

Evidence—Weight—Positive and Negative Evidence.†—Where there was positive testimony of three members of a train crew that just before an accident occurred the bell was rung and whistle blown, this testimony is conclusive where the only testimony to the contrary was that of a section foreman who was riding on a railroad velocipede to the effect that he did not hear the signals but that the noise of the velocipede made it very difficult to hear.

Appeal—Review—Harmless Error—Exclusion of Evidence.—Where there was conclusive evidence that signals by bell and whistle were given by the engineer on a train just preceding an accident, the refusal to permit testimony as to how far the signals could be heard, was immaterial.

*For the authorities in this series on the question whether railroad employees assume the risks from the violation of ordinances limiting the speed of trains or cars, see foot-notes appended to *Pittsburgh, etc., Ry. Co. v. Lightheiser (Ind.)*, 18 R. R. R. 176, 41 Am. & Eng. R. Cas., N. S., 176.

†For the authorities in this series on the question of the comparative weight of positive and negative testimony in regard to whether crossing signals were given, see foot-notes appended to *Northern Cent. Ry. Co. v. State (Md.)*, 16 R. R. R. 818, 39 Am. & Eng. R. Cas., N. S., 818; foot-notes appended to *Indiana, etc., R. Co. v. Otstot (Ill.)*, 14 R. R. R. 149, 37 Am. & Eng. R. Cas., N. S., 149; *McDonald v. New York Cent. & H. R. R. Co. (Mass.)*, 14 R. R. R. 125, 37 Am & Eng. R. Cas., N. S., 125.

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Master and Servant—Injuries to Servant—Assumption of Risk—Railroads.‡—That a section foreman went on a railroad velocipede by direct order of his superior, did not relieve him from the risk of injuries from trains, where his knowledge of the danger was equal to that of his superior.

Appeal from Circuit Court, Chippewa County; A. J. Vinje, Judge.

Action by Kate Ives, administratrix of the estate of Amos Ives, against the Wisconsin Central Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Action by plaintiff to recover for the death of her husband, caused by alleged negligence of the defendant. Decedent was a section hand employed by defendant, and had had several months experience in that employment. About 7 o'clock in the morning he, together with another section hand and the section boss, and at the direction of the latter, started in a dense fog eastward from Stanley to go to their work at the next station, riding on a railroad velocipede. They heard a passenger train come into the station from the east, but knew they had plenty of time to reach a road crossing about three-quarters of a mile from the station before that train would leave. They also knew and spoke of the possibility of a freight train, No. 29, arriving to meet the passenger, the freight being then nearly half an hour overdue. They progressed at the rate of about four miles an hour to within approximately 200 feet of the road crossing when suddenly the freight train was seen through the fog approaching them at a distance of 300 or 400 feet. They stopped the velocipede as quickly as possible, one sectionman jumped to the north side of the track, and the decedent, who was seated on the bicycle between the rails, attempted to go to the north side of the track, but evidently just failed to escape the engine, some portion of which struck him on the head and shoulder, causing death. The train was running rapidly, about 25 miles according to its engineer, and about 40 miles per hour according to the section boss. The road crossing mentioned was the eastern limits of the city of Stanley, so that the place of injury was within those limits where a speed of more than 15 miles per hour is prohibited by law. The section man heard no whistle or bell rung before the crossing, but the train crew all testified positively to the blowing of the whistle and the sounding of the bell. The section boss testified that the rattle of the velocipede would seriously embarrass, if not prevent, him from hearing such sounds. It was customary for trains to run at high rates of speed through the yards at Stanley,

‡For the authorities in this series on the assumption of risks of doing dangerous work in obedience to orders, see foot-notes appended to *Southern Ry. Co. v. Logan* (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Houston & T. C. R. Co. v. Turner* (Tex.), 18 R. R. R. 630, 41 Am. & Eng. R. Cas., N. S., 630.

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which deceased had for months abundant opportunity to observe. The evidence tended to show that train No. 29 was running faster than was usual for such a train. At the close of the evidence the court directed a verdict for the defendant on the ground that deceased had assumed the risk from which his death had resulted. From judgment on such verdict plaintiff appeals.

W. H. Frawley (*H. B. Walmsley*, of counsel), for appellant.
Howard Morris and *Thomas H. Gill*, for respondent.

DODGE, J. (after stating the facts). The case of *Hinz v. C., B. & N. W. Ry. Co.*, 93 Wis. 16, 66 N. W. 718, adopting the views expressed in *Pa. Ry. Co. v. Wachter*, 60 Md. 395, declares the rule that section men upon railroads assume the risk of trains of all sorts, regular or "wild," running over the tracks at all times and at such rates of speed as are attainable, and that, too, without notice or any warning except such as results incidentally from the ordinary noises of the train including, of course, such bell and whistle signals as are customary. Plaintiff's decedent met his death from such a risk. Nonliability is the legal conclusion from that situation.

Appellant seeks escape from that result, first, by reason of the fact that the accident occurred within the limits of a city where a speed greater, certainly than 15 miles per hour, perhaps than six miles, was prohibited by law. However meretricious, and therefore negligent, such lawlessness may be, yet the breach of the law results in no liability to one who, knowing it to be a custom of the company in the management of its business, accepts and continues in an employment exposing him to peril from such practice. *Abbott v. McCadden*, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910; *Williams v. Wagner Co.*, 110 Wis. 456, 86 N. W. 157; *Kreider v. Wis. Co.*, 110 Wis. 645, 657, 86 N. W. 662. That defendant was accustomed to run its trains through the city of Stanley at full speed without regard to the legal limit, and that deceased knew it, was undisputed, indeed, proved by the only eyewitness of the tragedy whom plaintiff called. Hence the fact that the speed of the train in question was illegal is of itself without significance.

Another contention of appellant is that this train was running at a speed greater than freight trains ordinarily maintained through the city, and especially much greater than that of freight trains approaching the station with the purpose of entering a side track to allow a passenger train to pass, as was that which caused the injury; hence the risk was not a usual one and not assumed. This argument confuses the risk which deceased assumed with considerations of what might constitute other forms of contributory negligence with reference to this particular train. Assuming that he knew that only a freight train was approaching, that it was to take the side track at the switch within a quarter mile to make way for a passenger, there might well be an argument that he was guilty of no negligence with reference to

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that train in proceeding on the assumption that it would not come upon him at 40 miles an hour, but that was not the only risk he assumed. He was bound to anticipate that his employer would use its track to run such trains as any exigency might require; not alone regular freight trains giving way to passenger trains, but specials, freight or passenger, or wild engines, to which right of way might be given over all trains with notice and instructions perhaps to station employees to clear tracks and arrange switches so that no check of speed need occur, but without notice to section men. Such use of tracks by railroad companies is within common knowledge and is usually within the contingencies of the employment which the track walker or the sectionman undertakes. That such was the undertaking of the section workers on defendant's road is testified to by the foreman, who says that, independently of regular trains, they were bound to be "expecting any minute a train when you are on the road; got to figure every minute that something comes along"; also that it was the duty of all sectionmen to keep out of the way of trains. There is no suggestion that 40 miles per hour is an unknown or even unusual rate of speed for some trains or engines; indeed, common knowledge is to the contrary, and the risk of a train at that speed at any moment which deceased assumed was not varied by the fact that it was unusual for this particular train to run so fast. We can discover nothing in such fact to show that the risk from which decedent suffered was not among those which he must be held to have assumed under the rule of *Hinz v. Railway Co.*, *supra*.

Appellant's further argument, that there was a jury issue as to whether the bell and whistle were sounded upon the train upon approach to the highway crossing, and that a departure from custom in that respect would be negligence not within the risks plaintiff assumed, is met in our judgment by respondent's contention that there was no such issue, but that such signals were proved without dispute. It has often been declared that when credible and unimpeached witnesses, having exact and certain knowledge so that they cannot be mistaken, testify affirmatively to the existence of a fact, such testimony is not put in issue by mere negative evidence of persuasive facts which, but for the affirmative evidence, might support an inference against the existence of the material fact; where at least the negative testimony may within reason be true and yet the fact may have existed. *Bohan v. Railway Co.*, 61 Wis. 391, 21 N. W. 241; *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238; *Konkel v. Pella*, 122 Wis. 143, 99 N. W. 453. In the present record is the positive testimony of the conductor, the engineer, and the fireman, all of whom were on the engine, that these signals were given, based as they declare on positive recollection. The improbability of any omission on this point is enhanced by the fact that they knew they were approaching another train, and were within a minute of the limit of time at which the operators of that train

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would have a right to assume that no train would approach from the east and might take some action tending to put one or both trains in peril. The conductor was riding on the engine partly from that consideration. Against this is only the testimony of the section foreman that he heard neither whistle, bell, nor roar of the approaching train, but he at once deprives this of significance by testifying that the velocipede makes a ringing noise on the rails, and replied to question, "Didn't it make so much noise that you couldn't hear the bell of that train or whistle?" "Pretty hard when you are on the car," "on account of the car ringing." "That is a common experience with section men whether with velocipede or hand car." He also testified that he and deceased were conversing; also that he did not hear anything of the other noises of the freight train. Appellant's suggestion that the same witness did hear the whistle of the passenger train behind him at much greater distance is neutralized by the fact that they stopped the hand car in order to listen and thereupon heard it. This state of the evidence also rendered immaterial the trial court's refusal to permit the foreman to testify how far an engine whistle or bell can be heard even if the questions so framed might be construed as inquiring as to results of the witness's experience and observation, and not for mere opinion. *Hanlon v. The M. E. Ry. & L. Co.*, 118 Wis. 210, 224, 95 N. W. 100.

It is strenuously argued by appellant that, because deceased was on the velocipede by direct order of his superior, he is absolved from any assumption of the risk, or at least that constitutes a new element which necessitates submission of the question to the jury. Doubtless there may be cases where a direct order from one having superior knowledge as to existence of dangers may constitute such an assurance against their existence that the subordinate when obeying may be absolved from contributory negligence when otherwise he would not, but, like every other situation where, upon all the evidence, including such direct order, there can in reason be but one conclusion, it is the duty of the court to so rule. Any contention that a direct command from a section boss to his crew to go or be upon the track negatives their assumption of the peril from passing trains the immediate proximity of which is known neither to them or him would effectually emasculate the rule of *Hinz v. Railway Co.*, supra, for we apprehend that the hand car seldom if ever starts over the track save by such command. In the case on which appellant relies, *Long v. Railway Co.*, 113 Ky. 806, 68 S. W. 1095, 38 L. R. A. 237, 101 Am. St. Rep. 374, the jury question was found not from the command alone, but from numerous facts tending to show ignorance on the subordinate's part of the full risk and such superiority of knowledge by the foreman that the former might well have believed from the command that the danger did not exist. In the case at bar there is not a suggestion of any knowledge either of the general perils or the specific danger on the part of the foreman which was not fully shared by the deceased, and we can discover nothing in the fact that they were

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proceeding along the open track, away from station grounds, under his orders, to relieve decedent from his assumption of all risks from the ordinary operation of the railroad, including that of a train at high speed.

We are unable to say that the trial court was wrong in concluding that the evidence established conclusively and without opportunity for reasonable difference of opinion or inference, that deceased had full knowledge of the imminence of such perils as that from which he suffered, and that, by accepting and continuing his employment, assumed the same so that the defendant could not be liable even if negligent in creating the peril.

Judgment affirmed.

 WIEST v. COAL CREEK R. CO.

(Supreme Court of Washington, March 7, 1906.)

[84 Pac. Rep. 725.]

Master and Servant—Injury to Brakeman on Logging Train—Complaint.—A complaint, in an action for injuries received by a brakeman on a logging train, which alleged that defendant's railroad was constructed in a negligent manner because its grade was too steep, that the train was too heavily loaded for the equipment to handle, that the brakes on the cars were insufficient, that the brakeman did not know of the defects and was not warned of the danger, that the train got beyond the control of the crew and proceeded down a steep grade at a high rate of speed, and that the brakeman, at the instance of the conductor, jumped from the train and was injured, stated a cause of action.

Same—Evidence—Admissibility.—Where, in an action for injuries to a brakeman on a logging train, the complaint alleged that the cars were equipped with defective brakes, and in such a manner that when the cars were loaded only one brake to a car could be used, questions asked a witness as to whether there was anything about the brakes which would render them unsafe by reason of their position on the cars, and as to whether any of the brakes were broken, were not objectionable.

Trial—Instructions—Statement of Issues Made by Pleadings.—Where the court submitted the question as to what the testimony was under the pleadings, a charge stating the issues made by the pleadings was not erroneous, as submitting issues on which no evidence was offered.

Master and Servant—Injury to Servant—Instructions.*—An instruction, in an action for injuries received by a brakeman on a logging train, that it was the duty of the company, exercising ordinary care, to keep the brakes on the cars in repair, and if it failed to do so and this caused the injury, and "if other causes contributed to it" the company was liable, was not prejudicial to it, for the instruction au-

*For the authorities in this series on the question of the degree of care required of a railroad company as an employer, see foot-notes appended to *Choctaw, O. & G. Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; foot-notes appended to *Houston & T. C. R. Co. v. Turner* (Tex.), 18 R. R. R. 630, 41 Am. & Eng. R. Cas., N. S., 630.

For the authorities in this series on the subject of logging railroads,

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thorized a verdict against it, on the jury finding that the failure of the company to exercise ordinary care to keep the brakes in repair caused the injury, though other causes might also have contributed to it.

Same—Existence of Relation—Loan of Servant to Third Person—Liability of Third Person.†—Where an employer lends his employee to a third person for a particular employment, the employee, for anything done in the particular employment, is the employee of the third person, though he remains the general employee of the employer.

Same—Duty of Master to Furnish Safe Appliances—Reliance by Servant on Performance of Duty.‡—An employee has a right to rely on the performance by the employer of the duty to furnish a safe place in which, and safe appliances with which, to work.

Appeal from Superior Court, Cowlitz County; A. L. Miller, Judge.

Action by George Wiest against the Coal Creek Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ralph E. Moody, for appellant.

Coovert & Stapleton, for respondent.

DUNBAR, J. The complaint in this case alleges, in substance, the corporate capacity of the defendant; that defendant owns and operates a railroad leading from Coal Creek slough to the logging camp of the Rue & Clyde Logging Company in Cowlitz county, a distance of about 2½ miles, by hauling logs thereon, with engines and logging cars belonging to said defendant, from said logging camp to said Coal Creek slough; that on November 9, 1903, while plaintiff was in the employ of, and working for, said Rue & Clyde Logging Company, in its said logging camp, said company, by agreement with defendant, loaned plaintiff to defendant at defendant's request, for the purpose of acting and working on said defendant's logging train as a brakeman in making a trip on a train of logs from said camp to said Coal Creek slough, and that plaintiff so worked as a brakeman on said trip at the request of defendant, and by defendant's license and permission, and under its direction; that in making said trip the

see foot-note appended to *Kent Lumber & Brick Co. v. Tax Assessor* (La.), 18 R. R. R. 446, 41 Am. & Eng. R. Cas., N. S., 446; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232; *McKivergan v. Alexander & Edgar Lumber Co.* (Wis.), 15 R. R. R. 372, 38 Am. & Eng. R. Cas., N. S., 372.

†For the authorities in this series on the question, who are, and are not, the employees of a railroad company, see foot-notes appended to *Parrott v. Chicago Great Western Ry. Co.* (Iowa), 16 R. R. R. 253, 39 Am. & Eng. R. Cas., N. S., 253; foot-notes appended to *Atlanta & W. P. R. Co. v. West* (Ga.), 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548.

‡For the authorities in this series on the subject of the right of an employee to rely on his master's performance of duties owing to him, see foot-notes appended to *Edgar v. New York, etc., R. Co.* (Mass.), 18 R. R. R. 403, 41 Am. & Eng. R. Cas., N. S., 403; *Louisville & E. R. Co. v. Poulter* (Ky.), 18 R. R. R. 26, 41 Am. & Eng. R. Cas., N. S., 26.

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train consisted of five logging cars, heavily loaded with green logs and in charge of Tom Allen, conductor and foreman of the defendant's crew; that plaintiff had no previous knowledge and experience as a brakeman upon a railroad train; that this was well known to defendant; that, notwithstanding this, the defendant recklessly, carelessly, and negligently gave plaintiff no instructions as such brakeman, or any warning of the danger and risk of such employment, though defendant well knew that its said railroad track, by reason of its heavy grades and defective equipment, was a peculiarly dangerous one, and that this was unknown to plaintiff; that defendant had constructed said railroad in such a careless, negligent, and unworkmanlike manner, in that its grade was too steep for safety and its rails too light for logging railroad traffic or a heavy strain, and on said trip used a defective, old, and worn-out engine which was originally built for light, quick traffic, and which was not equipped with good and sufficient brakes, and was not fitted for hauling so heavy a load, not properly geared and without whistle or bell, and without any means of signaling to brakeman or crew, and had so carelessly and negligently equipped said car with such poor, defective brakes, and in such a manner, that only one brake to a car could be set when said car was loaded, and had negligently overloaded the said train, of which plaintiff had no knowledge; that said train, by reason thereof, got beyond control of its crew, and proceeded down the steep grade aforesaid at a terrific and unmanageable rate of speed, causing the entire train to leave the track and pile up in a disastrous wreck. The complaint proceeded to state that the plaintiff, realizing the uselessness of longer remaining upon the train, at the instance of the conductor Allen, jumped from the train, struck the bank, rolled down upon the track, had one of his feet cut off, and received other injuries, and asked damages in the sum of \$20,500. A demurrer was interposed to the complaint, which was overruled. The answer was a denial of the negligent acts alleged in the complaint, and an allegation that the defendant entered into a contract with the Rue & Clyde Logging Company, whereby the defendant was to transport the logs over its railroad from the logging camp of the said Rue & Clyde Logging Company to Coal Creek slough for a compensation, under which contract the Rue & Clyde Logging Company was to load the logs upon the cars of the defendant and have full charge and control of the loading of said cars, and that the only obligation of the defendant was to convey; alleged that the Rue & Clyde Logging Company did load the cars and train on the said 9th day of November, 1903, upon which the plaintiff alleges he was, and that the plaintiff was an employee of the said Rue & Clyde Logging Company at said date and time; alleged assumption of risk on the part of the plaintiff, and contributory negligence. Upon the completion of the respondent's testimony, motion for nonsuit was made, which was overruled. Appellant introduced its testimony, rebutting the testimony which

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was introduced by the respondent. The jury was instructed, and returned a verdict in favor of respondent for \$5,000.

The appellant in its brief presents 28 assignments of error. While it is barely possible that, on the trial of a reasonably short case, 28 reversible errors might occur, yet, ordinarily, where so many errors are assigned, it is an indication that no particular assignment of error is relied upon. The first error assigned is the action of the court in overruling the demurrer to the plaintiff's complaint. The appellant insists that the complaint is so general that it is not specific enough to be sufficient, and does not therefore state a cause of action. We think it is sufficient to say, in relation to this assignment, that the complaint plainly states a good cause of action. This disposes of the second assignment, that the court erred in not sustaining the objection to the introduction of any testimony.

It is also alleged that the court erred in not sustaining defendant's objection to the question: "Was there anything about this brake, in operating it on that road in that manner, which would render it unsafe by reason of its position on the car, or its construction, or being difficult to get at, or any of those things?" Inasmuch as the allegations of the complaint were that the cars were equipped with poor, defective brakes, and were equipped in such a manner that only one brake to a car could be set when said cars were loaded, it would seem that the question was pertinent and directed to the proof of the allegations of the complaint. The next objection is that the court erred in not sustaining the defendant's objection to the question: "Were any of those brakes broken at that time?" This assignment may be classed with the one just above referred to. An examination of these alleged errors in relation to the introduction of testimony shows that they are without merit, and that no error was committed in the introduction of testimony or in sustaining objections thereto. Neither did the court err in denying defendant's case, as there was testimony which, if not contradicted, would sustain the main allegations of the complaint.

It is claimed that the court erred in giving the following instructions to the jury: "The plaintiff charges that the defendant's railroad was constructed in a careless, negligent, and unworkmanlike manner, in that its grade was too steep for safety for the operation of the train of the character of the one claimed to have been operated when the injury occurred; that the train on this occasion was too heavily loaded for the equipment to handle; and that the brakes on the cars were insufficient and out of repair." It is alleged that the court erred in giving this instruction, because it submitted to the jury issues upon which no evidence had been offered. The court in this particular was merely stating to the jury the issues which had been made up by the pleadings. The court, if it had seen fit, might have read the pleadings to the jury, or it might have stated them in a concise way, as it did. And so far as the criticism is concerned, that it

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was an instruction upon which no evidence was offered, this cannot be maintained in view of what the record shows; and, as to what the testimony was under the allegations of the complaint and answer, the court submitted that question to the jury. The following instruction is also assigned as error: "It was also the duty of the company to exercise ordinary care in keeping the brakes in repair. If the company had notice that the brakes were out of repair, or could have known it by the exercise of ordinary care, it was its duty to repair them so as to make them reasonably safe for the use intended, measured by the standard of ordinary care, and if it failed to so do, and this caused the injury, or directly contributed to it (if you find that other causes contributed to it), then the company would be liable. But if the brakes were kept in a reasonably safe condition for doing the work, or if the company exercised ordinary care in keeping the brakes in repair, then there would be no liability in this particular." The objection to this instruction seems to be to the parenthetical clause "if you find that other causes contributed to it." But, while it is a little difficult to understand what was intended by the interjection of that sentence, it is plain that it was not prejudicial to the appellant, as it imposed an additional burden of proof on the part of the respondent; because the court correctly stated the law that if it failed so to do—referring to its duty as expressed above—and this failure caused the injury or directly contributed to it, then the company would be liable, whether the jury found that other causes contributed to it or not. The most favorable construction, in appellant's interest, that could be put upon it, would be that the jury were instructed that if they found by a preponderance of the evidence, etc., the failure of the defendant to exercise ordinary care, and that such failure caused the injury or directly contributed to it, then the defendant would be liable, even though the jury should find that other causes might also have contributed to the injury. And this would have been a proper interpretation of the law. The same objection is raised in several subsequent assignments in regard to the instructions. The instructions as a whole were exceedingly fair and clear, and no possible prejudice could have attached to appellant's interest by reason thereof. The instructions asked for either had been given, in substance, or did not state the law.

It is also contended by the appellant that, under the circumstances shown by the pleadings and the proof, the respondent was a volunteer, and that he was in reality a servant of the Rue & Clyde Logging Company. But the law is well established that, when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205; *Grace & Hyde Co. v. Probst* (Ill.) 70 N. E. 12; *Consolidated Fire Works Co. v. Koehl*, 190 Ill. 145, 60 N. E. 87.

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On the question of assumption of risk, under the allegations of the complaint and the proof in this case, the respondent had a right to rely upon the well-known duty of the employer to furnish him a safe place in which to work, and safe appliances to work with. The dangers were not so apparent that he was called upon to take notice of them and make an investigation.

The case seems to be singularly free from errors.

The cause was submitted to the jury under proper instructions, and the judgment is affirmed.

MOUNT, C. J., and HADLEY, RUDKIN, CROW, and ROOT, JJ., concur. FULLERTON, J., concurs in result.

CHICAGO, M. & ST. RY. CO. v. RILEY.

(Circuit Court of Appeals, Seventh Circuit, April 10, 1906.)

[145 Fed. Rep. 137.]

Master and Servant—Injuries to Servant—Railroads—Appliances—Engineering Scheme.*—The location of a switch stand in a railroad yard by a railroad company between two tracks, so close to one of them that the switch handle would strike the steps of passenger cars on another track, was a part of an engineering scheme in the construction of the railroad, and, in the absence of manifest errors in construction patent to an ordinary observer, did not involve a question of negligence, to be passed on by a jury in an action for injuries to a switchman while using the switch.

Same—Safe Place of Work—Assumed Risk.†—A switchman in the employ of a railroad company was entitled to assume that the latter would use due care to furnish him with a reasonably safe place in which to do his work and to furnish suitable appliances in the operation of the business, and did not therefore assume the risk of the railroad company's negligence in performing such duties.

Knowledge of Defects—Failure to Warn.—Where defendant railroad company located a switch stand as a part of its prearranged plans for the construction of its yards in such a position between two track leads that under certain conditions likely to arise the handle of the switch would come in contact with the steps of passenger cars passing the stand, but such danger was neither obvious nor known to plaintiff, a switchman, who was injured by having his hand crushed between the switch handle and a car step, defendant was guilty of negligence in failing to warn plaintiff of the danger.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

*For the authorities in this series on the question whether a railroad employee has the right to act on the assumption that the railroad or its representative has or will perform the duties owing to him, see foot-notes appended to *Leach v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 212, 42 Am. & Eng. R. Cas., N. S., 212.

†For the authorities in this series on the subject of the duty of the master to warn and instruct his servants, see foot-notes appended to *Central of Georgia Ry. Co. v. Price* (Ga.), 19 R. R. R. 246, 42 Am. & Eng. R. Cas., N. S., 246; foot-notes appended to *Miller v. Boston & Maine R. R.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564.

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The defendant in error brings this suit to recover damages for personal injuries received on or about June 1, 1904. Riley had been in the service of the Chicago, Milwaukee & St. Paul Railway Company about nine years at different places in its Western avenue switch yards, and for two months he had been foreman or conductor in charge of the switch crew, operating, among other switches, switch known as No. 3, by means of which he alleges the accident occurred. He worked from 7 in the morning until 6 o'clock in the evening, and in the discharge of his duties threw said switch very frequently. The switch stand was of the kind known as a "ground switch." Immediately preceding the accident, the handle or arm depended from the stand on the east side thereof, and hung practically perpendicularly, resting in a slot, and hugging the switch stand. To throw the switch, defendant in error stood on the east side of the switch stand, reached down and seized the handle, raised it until it stood at a right angle to the switch stand, and then pushed it horizontally towards the north, 90 degrees. When the desired switch connection is made, the handle, released from the grasp of the operator's hand, drops again into a perpendicular position at that place, and is thereby set. The switch stand is one of a series of seven stands controlling several lead tracks. The switch stands were situated between two tracks, one known as the "rip lead track" on the south, upon which, with its connecting side tracks, defendant in error was employed as foreman of a switching crew engaged in sorting and distributing freight cars to the different side tracks, and the other or northern track known as the "passenger yard lead," over which passenger trains were moved to and from the storage yard lying to the west. The switch stands were used in connection with the rip lead track and its branches, and in the sorting of said cars, defendant in error had occasion to throw some one of said switches as often as one in each 10 minutes during the day. The distance between the passenger lead and the rip lead at switch No. 1 was 7 feet 10 $\frac{3}{4}$ inches; at switch 2, 7 feet 8 inches; at No. 3 (here involved), 7 feet 9 inches; and at No. 4, 8 feet 4 $\frac{3}{4}$ inches. At the other three switches the distance was much greater, owing to the curving of the track. The center of switch stand No. 1 was 4 feet 3 inches from the nearest rail of the passenger lead, and 3 feet 8 $\frac{3}{4}$ inches from the nearest rip lead rail. The center of switch stand No. 2 was 3 feet 1 inch from the nearest rip lead rail, and 4 feet 7 inches from that of the passenger lead. The center of switch stand No. 3 was 3 feet 9 inches from the nearest rail of the passenger lead, and 4 feet from the rip lead rail. The center of switch stand No. 4 was 4 feet 7 $\frac{1}{2}$ inches from the nearest passenger lead rail, and 3 feet 9 $\frac{1}{4}$ inches from the rip lead rail. The switch handle extended 21 inches from the center of the stand, and when raised was 14 inches above the base of the stand. This switching device had been in operation at that point for more than eight years, and no accident had theretofore occurred from its use.

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On the day in question, the switch engine under the charge of defendant in error and one car were upon the rip lead track at switch stand No. 1, about 30 or 40 yards distant from stand No. 3, moving to the west and toward switch stand No. 3. At the same time the coaches of the Elgin accommodation train were being backed westward and toward switch stand No. 3 on the passenger lead track. Defendant in error was desirous of setting the one car from the rip track onto side track 3. Standing on the east side of switch stand 3, he raised the switch handle, which was $1\frac{1}{2}$ or 2 inches in diameter, until perpendicular to the switch stand, taking hold of the end of it with his thumb and forefinger so that they extended beyond the end of the handle half a finger's length or width (plaintiff uses both terms). By the time he had moved the handle 90 degrees, or until it extended directly to the north, the Elgin train had backed up, and was passing from behind him to the westward, opposite the end of the extended switch handle. In some way, as he says, his hand was caught between the handle and one of the car steps of the Elgin train. The back of his hand, his forefinger, and his second finger were crushed. The thumb was not injured. He knew that the passenger train was approaching, but did not, he says, know that it would come near enough to the handle end to strike it or touch his hand. There is no evidence tending to show that plaintiff in error or any of its servants knew from observation that the handle and steps of any of the cars would collide in passing. Some of the witnesses who had operated the switch had observed that the steps came very close to the handle, and had been careful to throw the switch handle, which was the act of a moment, while the body of the car between the steps was passing, to avoid the steps. Trains were passing on the passenger lead at short intervals all day long. There was a slight northward curve in the passenger lead at or near switch stand No. 3. Assuming this to be so, defendant in error says there would be a lateral swaying or side motion, tending to throw the end of the car nearer the switch. The car which caused the accident cannot be identified. After the accident, the yardmaster of plaintiff in error, Costello, caused three passenger coaches to be pulled to the switch stand in suit and stopped. The steps of the second car from the engine, when thus standing, would not clear the handle. The first car did clear. The cars used varied considerably in width, the latest patterns being the widest. By stipulation of the parties, four photographic views of the tracks and switch stands in the immediate vicinity of switch stand 3 were introduced, and are part of the record on review. In his declaration defendant in error plaintiff below, charged negligence on the part of the plaintiff in error in placing and maintaining the switch, and in failing to give notice to him that the same was too close to the passenger lead. No question is raised as to the pleadings. At the close of the evidence, plaintiff in error requested the court to direct a verdict for the defendant, which

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request the court refused, and exceptions were taken, which are now before this court, numbered 1 to 4, inclusive. Other exceptions were taken to the ruling of the trial court in giving and refusing instructions. Exceptions 14, 15, and 16 refer to the admission of certain evidence. There was a verdict and judgment for the plaintiff below, and the case is brought here for review.

Chas. B. Keeler, for plaintiff in error.

James C. McShane, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge, after stating the facts, delivered the opinion of the court.

It is contended by plaintiff in error that the location and maintenance of switch stand No. 3 was an engineering problem, and that therefore the question as to whether plaintiff in error was negligent in that respect should not have been submitted to the jury.

It appears that the accident occurred in what are known as the "Western Avenue Yards" of the plaintiff in error; that these yards consist of a network of tracks, switches, and other appurtenances to railroad yards. It is manifest that, in order to secure the best results, there must be as great economy of space as is consistent with a reasonable regard to the convenience of business, such as the handling and storing of cars and locomotives, as well as to the reasonable safety of the employees. It cannot be said that a railroad company is required to arrange its tracks and yards mainly with a view to protect its employees. The object of railroad yards is to transact the business of the company. Employees should knowingly be subjected to no greater hazards, however, than are reasonably essential to the reasonable use of the yards. It is a matter of common knowledge that these places are very dangerous, and require the exercise of great caution on the part of those there employed. Defendant in error undertook and assumed all such hazards as were reasonably incident to his work. This doctrine is well stated in *Randall v. B. & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003. The court says:

"A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risk of that condition of things."

Was the location and maintenance of the switch in question an engineering problem—one which was arrived at as the result of engineering skill? In the case of *Tuttle v. D., G. H. & M. Ry. Co.*, 122 U. S. 194, 7 Sup. Ct. 1168, 30 L. Ed. 1114, the court uses this language:

"We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very

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sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. For analogous cases as to the rights of a manufacturer to choose the kind of machinery he will use in his business, see *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785; *Hayden v. Smithville Man. Co.*, 29 Conn. 548, 558. The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employees. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and, if they decide to do so, they must be content to assume the risks. For the views of this court in a cognate matter, see *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003."

The same doctrine was laid down in regard to a guard rail and blocking by the Court of Appeals for the Eighth Circuit in *Morris v. D., S. S. & A. Ry. Co.*, 108 Fed. 748, 47 C. C. A. 661, and by the same court in regard to an unblocked frog in *Gilbert v. B., C. R. & N. Ry. Co.*, 128 Fed. 531, 63 C. C. A. 27. Also by the Supreme Court of Illinois with regard to a butting post at the end of a stub track in *Railroad Co v. Driscoll*, 176 Ill. 334, 52 N. E. 921. Also by the Appellate Court of Illinois with reference to the close proximity to each other of two side tracks in *Railroad Co. v. Healy*, 109 Ill. App. 531, and in *St. Louis, etc., Yards v. Burns*, 97 Ill. App. 178. And by the same court with reference to the manner in which handholds were placed upon freight cars in *Railway Co. v. Armstrong*, 62 Ill. App. 233. The rule was applied to the construction of a bridge in *Illick v. Railroad Co.*, 67 Mich. 637, 35 N. W. 708.

The Supreme Court of Pennsylvania in the case of *Boyd v. Harris*, 176 Pa. 484, 35 Atl. 222, discussing an injury caused by a cattle chute placed in close proximity to a side track, says:

"This case presents a question, the importance of which extends far beyond the present parties, and the judgment to be entered herein. It is whether the location of the permanent structures along a line of railroad, necessary to accommodate its business, is to be determined by the railroad company or by a petit jury. If by the former, they may be located with reference to the convenient and economical use of the railroad, and the accommodation of its traffic. If by the latter, these considerations will be lost sight of, and the proper location will be a

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shifting one, to be settled by each successive jury in accordance with its own notions and the peculiar features of the case on trial. One jury may hold a given location to be safe and proper; the next jury may hold it to be unsafe, and therefore improper. There are many such structures necessary to the operation of a line of railroad. Among the more important of them may be mentioned the bridges, station houses, grain elevators, warehouses, water tanks, coal chutes, cattle chutes, signal stations, and tool houses. The position of these buildings with reference to the track of the railroad, their size, the mode of construction, must be determined with reference to their purpose, and their convenient use as a necessary part of the physical plant of the railroad company. Where they shall be placed, and how they shall be arranged, are questions that belong to the railroad company, as truly as the location of the switches and sidings, or of the track itself; and the discretion of its officers is no more under the control of a petit jury in the one case than in the other."

The holding of the courts in all these cases is that they are questions which belong to the railroad companies to decide, and cannot be submitted to a jury. It may then be assumed for the purposes of this hearing that the switch stand in question was part of an engineering scheme, and therefore, in the absence of those manifest errors in construction, which would be patent to an ordinary observer, did not involve a question of negligence to be passed upon by a jury.

There is nothing in the record, so far as it sets out the physical situation at the time of the accident, which would justify the court in finding, as a matter of law, that there was such an obvious and patent adjustment of the relative positions of the switch handle and the steps of the coaches running on the passenger lead as would charge either party to the suit with constructive knowledge of their dangerous relation to each other. The switch stand had been maintained eight years without accident. It lacked 1½ inches of standing in the middle of the 7 feet 9 inch space between the rip and passenger leads. As said by the court in the case of *Wood v. Louisville & Nashville Railroad Co.* (C. C.) 88 Fed. 46:

"The fact that no accident of this kind had happened before upon the railroad, and that trains were constantly passing this chute without the development of this danger, brings it directly within the class of what we may call 'concealed dangers.' This danger was lurking for years without its being known. The constituent element of it was a matter of mere inches, and that, in the very nature of things, could not be detected by ordinary observation."

If, however, the location and maintenance of the two was an engineering question, it follows that plaintiff in error knew the exact position of the two with regard to each other. The railroad company built, located, and maintained the switch stand. It built and operated the passenger lead track. In constructed

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the cars. They were all, it insists, parts of its yard plant. The whole situation was the result of a carefully devised plan, based upon scientific engineering principles applied to the needs of the railroad. There is no claim here that anything was out of order, or that the accident was occasioned by any defect in the switch or passenger lead not embraced within the prearranged plans of construction and maintenance. We are unable to see how plaintiff in error can escape the conclusion that it knew of the fact that the switch handle and car step would come into contact under certain conditions likely to arise. Under the facts of this case, defendant in error had a right to assume that the railroad company would use due care in furnishing him a reasonably safe place in which to do his work. This rule of law is well established. In the case of *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, the court says:

"The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties."

The case of *Texas & Pacific Railway Company v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, is very emphatically in point. The court says on page 672 of 170 U. S., page 779 of 18 Sup. Ct. 42 L. Ed. 1188:

"But no reason can be found for, and no authority exists supporting, the contention that an employee, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employee assumes the risks usually incident to the employment. The employee, on the other, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judgment on the employer's methods of business, or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated by which, where an appliance is furnished an employee in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the peculiar service in which he

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engages, the employee may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and, while this does not justify an employee in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's methods of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. * * * "Those [hazards] not obvious assumed by the employee are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures or appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation. *Kain v. Smith*, 89 N. Y. 375; *McGovern v. Central Vermont Railroad*, 123 N. Y. 280, 25 N. E. 373.' In *Missouri Pac. Railway v. Lehmberg*, 75 Tex. 61, 67, 12 S. W. 838, 840, the court considered a refusal to give a requested instruction, that if there were 'any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known, of same, and said defects caused or contributed to the injuries complained of, the jury should find for the defendant.' The court said: 'Without now considering the question whether the rule in this respect charges an employee with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances.' "

The evidence shows that defendant in error never was told of the danger that existed in throwing the switch, that he did not know of the same, and that the same was not open and obvious. The rule of law which requires a servant to exercise diligence and care to discover dangers does not apply here. "Upon this question," says the court in *Choctaw, O. & G. R. R. Co. v. McDade*, supra, "the true test is not in the exercise of care to discover danger, but whether the defect is known or plainly observable by the employee." It being clear that defendant in error did not know and was not chargeable with knowledge of the danger involved in working the switch, it follows that plaintiff in error was guilty of negligence in not advising defendant in error thereof, thus putting him upon notice. If this be true, then it is a matter of no consequence that the trial court may

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have overstated the duty of plaintiff in error toward defendant in error, or, indeed, as is insisted, that an engineering question may have been erroneously submitted to the jury. The duty of plaintiff in error towards defendant in error could be discharged only by the communication to defendant in error of its knowledge of the situation, and, upon its failure so to do, a legal conclusion of negligence on the part of the railroad company arises, which entitles defendant in error to recover for the injury unless the jury finds that he has been guilty of contributory negligence, or that the danger was so open and obvious as to charge defendant in error with constructive knowledge. These matters were properly submitted to the jury by the court under proper instructions, and the finding of the jury upon them in favor of defendant in error is borne out by the evidence.

Further discussion of the other assignments of error raised by plaintiff in error is not necessary. No prejudicial error appearing upon the record, the judgment of the lower court is affirmed.

HEMPHILL v. BUCK CREEK LUMBER CO.

(Supreme Court of North Carolina, May 22, 1906.)

[54 S. E. Rep. 420.]

Master and Servant—Injuries to Servant—Presumption of Negligence.*—Where a brakeman is injured because of the derailment of a car on which he is riding, a presumption of negligence on the part of the master arises.

Same—Assumption of Risk—Railroads—Application of Statute—Logging Road.†—Revisal 1905, § 2646, depriving any railroad operating in this state of the defense of assumption of risk as to any defect in the machinery, ways, or appliances of the company, applies to logging railroads.

Appeal from Superior Court, Buncombe County; W. R. Allen, Judge.

Action by A. W. Hemphill against Buck Creek Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*For the authorities in this series on the question whether a presumption of negligence on the part of the master or his representative arises from the fact that one of his servants is injured, see foot-notes appended to *Choctaw, etc., Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; *Looney v. Metropolitan R. Co.* (U. S.), 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617.

†For the authorities in this series on the subject of the applicability of employers' liability acts, see foot-notes appended to *Cahill v. Boston & M. R. R.* (Mass.), 18 R. R. R. 830, 14 Am. & Eng. R. Cas., N. S., 830.

For the authorities in this series on the subject of logging railroads, see foot-note to *Kent Lumber & Brick Co. v. Tax Assessor* (La.), 18 R. R. R. 446, 41 Am. & Eng. R. Cas., N. S., 446; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232; *McKivergan v. Alexander & Edgar Lumber Co.* (Wis.), 15 R. R. R. 372, 38 Am. & Eng. R. Cas., N. S., 372.

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Busbee & Busbee and *Justice & Pless*, for appellant.

Locke Craig and *P. H. Winston*, for appellee.

CLARK, C. J. The plaintiff was injured in the derailment and wreck of a train of cars loaded with logs and tan bark, which was running backward at a speed of 8 to 15 miles an hour. He was a brakeman and in the discharge of his duty on the front end on the car farthest from the engine. This railroad was a lumber road, with iron rails, 4-feet gauge, and using steam locomotives. The plaintiff testified that the rims of the wheels of the car on which he was riding were not as wide as the rims of the wheels of the other cars, and hence that car was more liable to get off the track; that this happened often on the new part of the road, but not on the older part; that this car was not the same height as the car to which it was coupled, which necessitated the use of a bent link; that the only bent link he could get was crooked, and this made it necessary for the brakeman to be on this front car of the backing train to watch it, as it might break and turn the car loose. It was not controverted that at the place the derailment occurred the track was in bad condition, the cross-ties too rotten to hold the spikes and rails that the defendant's foreman had inspected and found this to be true before the wreck, but the plaintiff testified that he knew nothing of the condition of the track at that point; that the derailment occurred at a curve where the track had spread on account of the rotten cross-ties.

The court properly refused the defendant's prayer to instruct the jury that if they believed the evidence to answer the first issue (negligence) "No." "Where there is a collision or derailment, and in like cases, the presumption of negligence arises." *Wright v. Railroad*, 127 N. C. 229, 37 S. E. 221; *Marcom v. Railroad*, 126 N. C. 200, 35 S. E. 423; *Kinney v. Railroad*, 122 N. C. 961, 30 S. E. 313; *Grant v. Railroad*, 108 N. C. 470, 13 S. E. 209; 2 S. & R. Neg. § 516, and numerous cases there cited. The above was cited and approved in *Stewart v. Railroad*, 137 N. C. 689, 50 S. E. 312. There was, besides, evidence that both the car and the track were defective. The court also properly refused to charge the jury that if they believed the evidence to answer the second issue (contributory negligence) "Yes." The burden of this issue was upon the defendant, and, besides, the evidence was conflicting.

The defendant further insisted that the "fellow servant act" (Revisal 1905, § 2646), which deprives "any railroad operating in this state" of the defense of assumption of risk as to "any defect in the machinery, ways or appliances of the company" does not apply to lumber roads, and therefore its first prayer should have been given. In *Schus v. Power-Simpson Co.*, 69 L. R. A. 887, 85 Minn. 447, 89 N. W. 68, this point was raised under the Minnesota "fellow servant act," which is very similar to that in this state, and the court held that the words "every railroad corporation owning or operating a railroad in this state"

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embraced a "logging road," that, though it is not a common carrier of freight and passengers, its employees engaged in the operation of its trains are exposed to the same dangers and risks as are employees of railroads operating as common carriers, and come within the spirit and intent of the act, and that the wider signification of the word "railroad" meaning any road operated by steam or electricity on rails was intended by the Legislature. Both street railways and logging roads are railroads—i. e., roads whose operations are conducted by the use of rails and come within the general term "railroads," certainly within the meaning of the fellow servant act, which sought to protect all employees, engaged in this dangerous avocation, by requiring safe ways, machinery, and appliances, and taking away from such companies the defense that an employee had been injured or killed by the negligence of a fellow servant. In *Hancock v. Railroad*, 124 N. C. 222, 32 S. E. 679, the point was made that street cars and lumber roads were not within the fellow servant law. It was not necessary to pass upon the point in that case, but in *Witsell v. Railroad*, 120 N. C. 557, 27 S. E. 125, which was an action against a street car company, the rule as to the nature of appliances required on all "railroads" was laid down, and street cars have in all cases been treated ever since in this court as liable to the same duties as any other railroad. In *Fleming v. Lumber Co.*, 128 N. C. 532, 39 S. E. 43, where the negligence alleged was such that the judge below nonsuited the plaintiff, evidently on the ground that the fellow servant act did not apply to a lumber road, this court by a per curiam order set aside the nonsuit and directed that the issues should be submitted to a jury. In *Craft v. Timber Co.*, 132 N. C. 156, 43 S. E. 597, it was held that the rules applicable to other railroads, as to negligence causing fires originating on the right of way "applied to private railroads constructed for logging purposes," and this was reaffirmed in *Simpson v. Lumber Co.*, 133 N. C. 96, 45 S. E. 469. The same rule as to defective spark arresters was held applicable to lumber roads as to other railroads. *Cheek v. Lumber Co.*, 134 N. C. 230, 46 S. E. 488, 47 S. E. 400. No error.

 LOUISVILLE & N. R. CO. v. WYATT'S ADM'R.

(Court of Appeals of Kentucky, May 16, 1906.)

[93 S. W. Rep. 601.]

Pleading—Form of Allegations—Alternative Allegations.—A petition, alleging that plaintiff's intestate was killed by one or more of three different acts of negligence charged, was proper under Civ. Code Prac. § 113, subsec. 4, authorizing a party to allege alternatively the existence of one or another fact, if he states that one of them is true and that he does not know which of them is true; the statute not prohibiting the statement of more than two inconsistent facts.

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Master and Servant—Injuries to Servant—Fellow Servants.*—A master is not liable for injuries to a servant from the negligence of a fellow servant, unless the master failed to exercise ordinary or reasonable care in the selection of the latter servant.

Same—Question for Jury.—In an action against a railroad for the death of a conductor, held a question for the jury whether the engineer and certain brakemen were incompetent.

Same—Assumption of Risk—Promise to Remove Danger.†—Where the rules of a railroad made it the duty of a yardmaster to call out the men to compose the different crews on freight trains, and provided that a yardmaster must not permit a train to start with brakemen unfitted for duty, though it was the duty of the "master of trains" to employ and discharge employees, a complaint by a conductor to the yardmaster of the unfitness of certain brakemen was notice to the railroad, and the yardmaster's promise of better men for the next trip, which promise was relied on by the conductor, placed on the railroad all risk for injuries to the conductor caused by the unfitness of the brakemen.

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Action by E. G. Wyatt's administrator against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. A. Mitchell and Benjamin D. Warfield, for appellant.

B. F. Proctor and Greene & Van Winkle, for appellee.

NUNN, J. On November 18, 1898, at about the hour of 3:30 a. m., the appellee's intestate, E. G. Wyatt, was injured at South Tunnel, in the state of Tennessee, a station on the appellant's main line, between Bowling Green and Nashville, and died within about 30 minutes thereafter. The deceased had been for seven or eight years a freight train conductor in appellant's employ-

*For the authorities in this series on the question whether railroad employees assume risks from their fellow servant's negligence or incompetency, see foot-notes appended to *Mollhoff v. Chicago, etc., R. Co.* (Okl.), 19 R. R. R. 709, 42 Am. & Eng. R. Cas., N. S., 709; foot-note appended to *Tennessee Coal, Iron & R. Co. v. Bridges* (Ala.), 19 R. R. R. 688, 42 Am. & Eng. R. Cas., N. S., 688; *Spangler v. Baltimore & O. R. Co.* (Pa.), 19 R. R. R. 687, 42 Am. & Eng. R. Cas., N. S., 687; foot-notes appended to *Southern Pac. Co. v. Hetzer* (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724.

†For the authorities in this series on the question whether the knowledge of a railroad employee is notice to the company, see foot-notes appended to *Merrill v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 221, 42 Am. & Eng. R. Cas., N. S., 221.

For the authorities in this series on the right of a railroad employee to assume that the company or its representative has, or will, perform its duties to him, see foot-notes appended to *Illinois Cent. R. Co. v. Cane* (Ky.), 19 R. R. R. 823, 42 Am. & Eng. R. Cas., N. S., 823; *Graham v. Minneapolis, etc., Ry. Co.* (Minn.), 19 R. R. R. 232, 42 Am. & Eng. R. Cas., N. S., 232; foot-notes appended to *Leach v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 212, 42 Am. & Eng. R. Cas., N. S., 212; *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Edgar v. New York, etc., R. Co.* (Mass.), 18 R. R. R. 403, 41 Am. & Eng. R. Cas., N. S., 403; *Louisville & E. R. Co. v. Poulter* (Ky.), 18 R. R. R. 26, 41 Am. & Eng. R. Cas., N. S., 26.

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ment, running on the division between Bowling Green and Nashville, and was regarded by the appellant as one of its most trustworthy and competent conductors. On this fatal trip the train, designated as "second 19," of which Wyatt was the conductor, was made up of 18 cars, besides the caboose, 7 of which were loaded and 11 empty, and all, except the two rear cars and the caboose, equipped with the best air brakes. The first 5 cars were loaded box cars, the next 4 were empty flats, and, of the remaining 9, the two next to the caboose were loaded, and the residue empty. The train left Bowling Green shortly after midnight, with the following crew: J. W. Hamby, engineer; Tim Hogan, fireman; J. C. Wilsford, head brakeman, Frank Small, middle brakeman; J. H. Bowsman, flagman or rear brakeman; and the deceased, as the conductor. They proceeded with the train to South Tunnel. The conductor had received an order to meet at that place the north-bound freight trains Nos. 14 and 74. On arrival at that station, Wyatt's train headed into the passing track, and No. 14, which had already arrived and was standing on the main track, pulled out, and proceeded on its journey north, and the night operator handed to the conductor and engineer a telegram ordering Wyatt to detach from his train, and leave on a siding, at South Tunnel, the four flats, which were the sixth, seventh, eighth, and ninth cars from the engine, and Norris, the operator, also informed the engineer and conductor that train No. 74, which they were to meet there, had not left Gallatin, a station six miles south.

While the evidence is conflicting, yet a preponderance of it shows there was a fog that morning, and that it was very dark, but there was little trouble in distinguishing the signals when given. The grade of the track, on which the train was standing, was descending from the middle of the train, both north and south, for about six or seven miles each way. The rear car, of the four flats, which was the ninth car from the engine, was on the crest or top of the grade, thus placing the engine, with five loaded box cars and the four empty flats, on the south down grade, and the other half (nine cars and caboose) on the north down grade. These four flat cars were to be switched on to a spur track, connected with the passing track, a short distance south of where they stood. To make this switch it was necessary for this engine and part of the train to pass out upon the main line a short distance. The head brakeman, Wilsford, was sent by Wyatt south a short distance beyond the switch, connecting the main and passing tracks, and beyond the head of the engine, to flag No. 74, while the flagman, Bowsman, remained upon the rear of the train, while the middle brakeman, Small, and conductor, Wyatt, proceeded to uncouple the train, at the north end of the four flats, with the purpose of then pulling that part of the train south and backing into the spur track, where they were to be cut and left as directed. Small "cut" the airhouse, and attempted to "cut" the cars, but failed, by reason of the grade

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of the track above described. The slack was all out, and the pin uniting the draw bars could not be pulled out by operating the lever without a slackening of the coupling, which could only be had by a backward movement of the engine, called "giving the slack." When Small attempted to uncouple the cars and failed, Wyatt then said he would uncouple them, and directed Small to give the engineer a slack signal, which was done, and the cars separated and the back cut of cars began to roll downgrade, and Wyatt stepped in between them, with his face towards the backing cars, and turned the "angle cock" on the airhouse, which suddenly stopped the cars, and at that moment the front cut of cars was backed by the engineer, and caught Wyatt between the draw heads, with the result stated. The proof shows that a "slack signal" means barely a moving of the engine so as to loosen the couplings. The brakeman, Small, testified that he gave this signal, and immediately gave the stop signal. The engineer testified that he was given the rapid back up signal, instead of the slack signal. The proof shows that the cars were backed, by the engine, two or three car lengths. From the circumstances of this killing, it is evident that the engineer, and the brakeman, or one or the other, was incompetent and reckless. It is certain that the engineer did not continue to back the cars, from the time he received the slack signal; if so, Wyatt could not have been caught between the draw heads. It is certain that the engineer backed his train on a signal from Small to move forward, or that Small gave a back up signal, when he should have signalled to move ahead. The appellee introduced several expert railroad men, who testified that these facts showed that the engineer and Small, the brakeman, either or both, were unfit, incompetent, and reckless for their positions. This evidence was not really needed. The circumstances of the killing, as related by them, showed that one or the other, at least, was unfit and incompetent.

The appellee administered upon the estate of her husband, and instituted this action in the Warren circuit court to recover damages for the negligent and wrongful killing of her intestate. She made five paragraphs in her petition. In the first she alleged, in substance, that his death and injury was the direct and proximate result of the gross negligence of the defendant in employing and retaining two incompetent brakemen, to wit, Small and Bowsman, whose incompetency and unfitness to discharge the duties required of them was well known to the defendant, before the injury to Wyatt, and in time for the defendant to have prevented the injury by the exercise of ordinary care, and that her husband did not know of their incompetency. By her second paragraph she alleged, in substance, the same facts, with reference to the engineer, Hamby. In the third paragraph she alleged, in substance, that the defendant, with gross negligence, furnished an engine to haul this train that was defective and out of repair, and the machinery and brakes that were put upon the cars were

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defective and out of repair, and not sufficient to operate the same. By the fourth paragraph it was, in substance, alleged that the defendant, in violation of its duty, did, with gross negligence, fail and refuse to establish, publish, and enforce any rules defining the duties of the employees on this freight train and its engine, and to know that its employees thereon were acquainted with such rules. That appellant knew that it had so failed, and that her intestate did not know it. The fifth paragraph reads as follows:

"This plaintiff says, further, that her said husband received his injuries as aforesaid set forth in the four preceding paragraphs of this petition as the direct and proximate result of the gross negligence of defendant as set forth in one of said paragraphs, or as the direct and proximate result of the gross negligence of defendant combined in one or more or all of the paragraphs of this petition, and she cannot tell by which specific act of negligence he was killed, nor can she tell which specific acts herein set forth combined to kill and injure him; but he was killed and injured by all combined or one or more of such acts of negligence, and she was damaged in the sum of \$25,000 thereby, without fault on the part of her husband. This plaintiff says, further, that it was the law of Tennessee at the time of the death of her said husband that a cause of action existed to him for any injuries received as alleged in the foregoing paragraphs of this petition, and at his death that cause of action survives to his widow and next of kin, who may recover in this action for any mental and physical suffering, and for the destruction of his power to earn money; and it was further the law of the said state that the contributory negligence of her husband, if any, only went in mitigation of damage, and was not a defense to the action. The Tennessee statute (Milliken & V. Code) which gave such remedy, then and now in force, is as follows:

"Chapter 2, § 3130. The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing by another, would have had against the wrongdoers in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claim of creditors.'

"Chapter 2, § 3134. Where a person's death is caused by the wrongful act, fault or omission of another, and suit is brought for damages, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time and necessary expense resulting to the deceased, from the personal injuries and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.' "

The appellant answered controverting all the material allega-

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tions of the petition, and averred that Wyatt was a conductor of the train, and in the exclusive control and management thereof; that the crew of the train was under his control and subject to his orders; and that the defendant was not responsible nor liable for any injury resulting to decedent, by reason of any alleged act or negligence on the part of the engineer or any other member of the crew. And the appellant further alleged that at the time of the injury the deceased was not acting in the line and scope of his duty, as conductor of the train, but was voluntarily engaged in doing and performing work which it was the duty of one or more of the brakemen to have performed. The affirmative matter of the answer was controverted by a reply.

On the first attempted trial of this case the appellee filed amended petition, which is as follows: "This plaintiff comes and says that she did not know till a day or two before J. C. Wilsford was introduced as a witness in her case that her decedent and husband, E. G. Wyatt, deceased, had made any complaint to defendant about the incompetency of Bowsman and Small, and she asks now to amend to conform to the proof, and says she is informed and charges the night her husband was killed, as alleged in her petition, her said husband, as conductor of defendant, made complaint to and informed defendant that said Bowsman and Small were incompetent and unfit to discharge the duties of brakeman, and defendant agreed and promised said decedent to give him another and better crew on the next trip to Nashville, and she says that she believes and charges that her said husband was relying upon said promise at the time of his injury and death as set out in her original petition. She says further that either her husband knew that said Bowsman and Small were incompetent and notified defendant as aforesaid and relied upon this agreement as aforesaid, or that said decedent did not know their incompetency, and that one of the said state of facts is true, and she does not know which state of facts is true." The appellant filed an answer controverting this amended petition. A trial resulted in a verdict in favor of appellee for \$6,500. From this judgment the appellant appeals.

The first error of the court, complained of by the appellant, is that the court failed to sustain its motion to compel the appellee to elect which of the several grounds of recovery set up in her petition and amended petition she would rely upon, and that the other grounds be stricken from the pleadings. Subsection 4 of section 113 of the Civil Code of Practice reads: "If, however, a party files a pleading, which contains inconsistent statements, or statements inconsistent with those of a pleading previously filed by him in the action, he shall, upon motion, be required to elect which of them shall be stricken from his pleading. But a party may allege, alternatively, the existence of one or another fact, if he states that one of them is true, and that he does not know which of them is true." The appellee set forth in her pleadings but one cause of action—that was for damages for the

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negligent killing of her intestate. She alleged that the wrong was perpetrated by one or more of several acts of negligence, committed by the appellant and its agents, and she stated that one or more of them were true, but did not know which of them. The appellant contends that the Code does not provide or allow the statement in a pleading of more than two inconsistent acts, and, as appellee stated more than two, therefore the court should have sustained its motion. We do not think this a proper construction of this provision of the Code. If a party loses his life, and it is alleged that his death was caused by one or more of three different acts of negligence, but did not know which, in substance and effect this would be proper pleading under the Code. There can be no good reason shown why this provision should be limited to two inconsistent facts, and in our opinion it was not intended to be so limited. See *Pugh v. C. & O. Ry. Co.*, 39 S. W. 695, 19 Ky. Law Rep. 149, and *Ky. Central Ry. Co. v. Ryle*, 18 S. W. 938, 13 Ky. Law Rep. 862.

On the trial it appears that the appellee abandoned all grounds for a recovery except those charging incompetency and unfitness of the engineer and the two brakemen, and for the failure of appellant to furnish its employees a book of rules for their guidance, examining them with respect to their efficiency, and instructing them with reference to their duties. It is conceded that the law of the state of Tennessee and Kentucky, as construed by the courts of both of the states, is the same with reference to the liability of the master for the failure to furnish the servant with proper appliances for the performance of his work, and for the failure to associate with him competent and fit co-employees. In neither state is the master liable for injuries committed by the negligent act of one servant upon a fellow servant, unless the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of the want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant. See 3 *Thomp. on Negligence*, 974; 12 *Am. & Eng. Ency. of Law*, p. 909, and many authorities there cited. Appellant concedes this to be the correct principle, but contends that there was not sufficient evidence to show that the employees named were unfit and incompetent. In addition to the facts already stated, it was shown that the engineer had, previous to that time, by the operation of his engine, killed his fireman; upon another occasion had run into another train; also at another time had broken a car. It was shown by the appellant, however, that in two instances he was exonerated from all blame by the company. The testimony was about equi-ponderant as to the incompetency of the brakeman Bowsman,

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but largely preponderated as to the incompetency of the brakeman Small. It was shown that he was employed without ever having been examined as to his fitness for the position, and never was instructed with reference to his duties; nor was he and Bowsman furnished with a copy of the rules of the company, which provided the manner by which they should perform their duties.

The proof also showed that Wyatt had made, possibly, a dozen trips with Bowsman as brakeman, but only one with Small. The head brakeman, Wilsford, testified that these two brakemen were incompetent and unfit, and that he was present at the depot a short time before Wyatt started upon the fatal trip; that he heard Wyatt say to appellant's yardmaster that the brakemen referred to were incompetent, and objected to going out on a trip with them, and asked for other brakemen, and the yardmaster told him to make this trip with them, and on the next trip would furnish him good and competent men. This statement was contradicted by appellant's yardmaster. In view of all this evidence, we are of the opinion that the court did not err in refusing to give a peremptory instruction in behalf of appellant. The appellant contends that this notice to the yardmaster was not notice to appellant of the incompetency of these men, nor did the promise of the yardmaster to furnish on the next trip better men bind the company, as he had no power or authority to make the promise; that this power existed alone in one Howard, whose office was in Nashville. It was shown by the proof that it was the duty of the yardmaster to call out the men to compose the different crews on the train starting from that point. Rule 218 was introduced, which was shown to be applicable to the duties of the yardmasters, which reads as follows: "They must not permit a train to start with an engineman, conductor or brakeman who is under the influence of liquor, or unfit for duty, or fail to report such occurrence at once to the master of trains." While it was shown that it was the duty of Howard, the master of trains, to employ and discharge employees of appellant, engaged in this service, yet the proof shows clearly that it was the duty of the yardmaster to make up the trains, and to select the crews to take them out, and he was enjoined by the rules from sending out any unfit person. We are of the opinion that notice to him of the incompetency of these men was notice to appellant, and the promise made by him of better men for the next trip, if Wyatt relied upon this promise, placed the risk upon appellant for the injury and death of Wyatt, provided that his injury and death were caused by the incompetency of these employees. See case of Fagg's Administrator v. L. & N. R. Co., 63 S. W. 580, 23 Ky. Law Rep. 383, 54 L. R. A. 919, and Glenn's Administrator v. L. & N. R. Co., 90 S. W. 975, 28 Ky. Law Rep. 949.

The appellant complains that the court erred in not permitting the jury to determine from the evidence whether notice to ap-

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pellant's yardmaster at Bowling Green of the incompetency of the two brakemen was notice to the appellant. As there was no contradiction in the evidence as to the facts on this point, this was a question for the court, and the court did not err with reference thereto.

The appellant makes other objections to the instructions, but it is sufficient to say that they appear to be correct; at least, not prejudicial to the appellant. The court did not permit appellee to recover for the simple negligence of the appellant's employees, but required the jury to believe from the evidence, before they could find a verdict for her, that the injury to her intestate was the direct and proximate result of the negligence and incompetency of Hamby, Small, and Bowsman, or either of them, and they were further required to believe from the evidence that appellant's agents charged with the duty of hiring, discharging, or suspending its employees, whose negligence, if any, caused the injury, knew of the incompetency of such employees, if any, or could have known it by the exercise of ordinary care, in time to have prevented the injury by such care. See *L. & N. R. R. Co. v. Whitlow's Administrator*, 43 S. W. 711, 19 Ky. Law Rep. 1931, 41 L. R. A. 614.

The appellant also complains of improper remarks to the jury by counsel for the appellee. We deem it unnecessary to refer to the matter in detail, as the remarks were of a trivial character, and could not have prejudiced the substantial rights of the appellant.

The judgment is affirmed.

SETTLE, J., not sitting.

 NORTH CHICAGO ST. R. CO. *v.* AUFMANN.

(Supreme Court of Illinois, June 14, 1906.)

[77 N. E. Rep. 1120.]

Limitation of Actions—Commencement of Action—Amendment of Pleading.—Where an original and amended pleading, in an action for injuries to an employee of a street car company, declared on the negligence of the company in failing to furnish proper assistance and in furnishing an incompetent gripman of a cable train, and were filed within two years after the injuries occurred, additional counts, based on the same grounds of negligence, and filed after the expiration of the two years, were not barred by limitations, though the original and amended pleading stated the cause of action defectively.

Master and Servant—Injuries to Servant—Vice Principal—Instructions.—In an action for injuries to an employee of a street car company, evidence that he made complaint of the insufficiency of his help in moving cars to the company's foreman in charge of the barns, and that the foreman instructed him to go ahead and he would soon send help, was sufficient to authorize an instruction that, where a master confers authority on an employee to take charge of a class of workmen, the employee in directing the men, is not a fellow servant, and his directions are the commands of his master.

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Same—Assumption of Risk—Command of Master.*—Where an employee of a street railroad company was ordered to move cars in the car barns without proper assistance, on a promise that he would be furnished assistance, he did not assume the risk of injury, unless the danger was so imminent that no man of ordinary prudence would engage in the work.

Appeal from Appellate Court, First District.

Action by Joseph Aufmann against the North Chicago Street Railroad Company. From a judgment of the Appellate Court, affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action on the case in the circuit court of Cook county by appellee, Joseph Aufmann, against the North Chicago Street Railroad Company, appellant, to recover for personal injuries. The accident upon which the action was founded happened on December 23, 1896, between 7 and 8 o'clock p. m., at appellant's cable barn at the southwest corner of Wrightwood and Sheffield avenues, in the city of Chicago. Sheffield avenue extends north and south on the east side of the barn, and Wrightwood avenue extends east and west on the north side. Lincoln avenue comes in at the intersection of these two streets, near the northeast corner of the barn. The Lincoln avenue cable cars of appellant enter the barn at the northwest corner, pass along near the west side towards the south, then turn to the east, cross the barn, and go northward along the east side to the northeast corner, where they pass out into the street. The track upon which the trains make the trips through the barn is called the "loop." There are a number of storage tracks in the barn extending the whole length of it. During the hours of the day when traffic was slack the cable trains would enter the barn and be broken up, and the cars placed upon the various storage tracks until they were again ready for use. At the south side of the barn was a transfer track with a platform or table. Cars were pushed on this platform or table from the various storage tracks, and the platform moved east or west to some other storage track on which the cars were to be placed. Between the storage tracks, every 16 feet, were posts 12 inches square. At the time of the accident the appellee was a member of the barn crew which had in charge the making up and breaking up of trains and the transfer of cars from one storage track to another. On this occasion he was bringing a car from the transfer table north upon the third storage track from the east, with the intention of depositing it within the space inside the loop, and in order to accomplish this it was necessary to cross the loop tracks. A train came around the loop, and he was caught between the car which he was moving and one of those in the train and received

*See foot-notes appended to *Edgar v. New York, etc., R. Co.* (Mass.), 18 R. R. R. 403, 41 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to *Southern Ry. Co. v. Logan* (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374.

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the injury for which he sues. Upon a trial before the court and a jury, judgment was rendered in his favor for \$1,500, which has been affirmed by the Appellate Court.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant.

David K. Tone and H. M. Ashton, for appellee.

WILKIN, J. (after stating the facts). It is first insisted by appellant as a ground of reversal that the court committed error in sustaining appellee's demurrer to its plea of the statute of limitations. The accident happened on December 23, 1896. This suit was begun on April 22, 1898. The original declaration, of one count, was filed on May 7, 1898, and charged that the defendant was the owner of a certain barn, known as the "Lincoln avenue car barn"; that said barn was supplied with switches, turntables, and appliances for turning about, reversing, and removing cars from the main line; that a certain car was moving along the main line of the defendant in said barn, and that the plaintiff was switching another car from said main track, and the first mentioned car collided with the car which he was switching, striking the rear end of the same and injuring him while he was in the act of applying the brake to the car. The negligence charged was that defendant failed to furnish plaintiff sufficient assistance to enable him to properly perform his duties, and that the gripman in charge of the cable train was incompetent to perform his duties, and negligently propelled and ran the cable car against the plaintiff while the plaintiff was in the exercise of ordinary care. A demurrer was sustained to this declaration, and on June 22, 1898, within two years after the accident, plaintiff filed an amended declaration of one count, alleging that he was in defendant's employ as a groom, and while handling the car in question, and while in the exercise of ordinary care, the defendant, through its servants, negligently and carelessly ran another cable train upon and into the car upon which he was, thereby injuring him. To this amended count the defendant pleaded the general issue.

On January 17, 1901, more than two years after the alleged injury, the plaintiff filed two additional counts, the first charging that the defendant negligently ordered certain men, whose duty it was to handle the horse used in switching the cars, to leave this regular employment and to work upon the snow sweeper; that it was highly dangerous for one person to handle said cars and switch them without assistance; that plaintiff kept on switching said cars and acting under the immediate direction of said defendant without any person to assist him; and that, by reason of such negligence to supply sufficient assistance in managing the cars, plaintiff was unable to stop the car upon which he was working in time to avoid the injury. The second additional count charged that the defendant caused the plaintiff to remain and continue in said employment, promising that it would within

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a reasonable time supply him with additional assistance or help in starting the cars, and that, acting under the immediate direction of said defendant, and without any person to assist in switching the cars, plaintiff, while in the exercise of ordinary care, was injured by reason of said negligence. On February 5, 1901, plaintiff filed two other additional counts, the first of which alleged that he complained and notified the defendant that he was not supplied with any help or assistance in switching cars over said loop, and that the switching of said cars without help was highly dangerous; that it promised to furnish additional assistance within a reasonable time, and plaintiff, relying upon said promise, continued to operate said cars and was injured. The second additional count is substantially like the preceding one. To these additional counts of January 17th and February 5th the defendant filed a plea of the statute of limitations, to which plaintiff demurred, and the demurrer was sustained. The sustaining of this demurrer is assigned as error.

It seems to be conceded by both parties that, if the additional counts are simply a restatement of the cause of action alleged in the declaration, or some amendment thereto filed within two years after the date of the accident, the demurrer to the plea of the statute of limitations was properly sustained. But it is insisted by appellant that whether any of the additional counts are simply a restatement of the cause of action alleged in the declaration filed within two years, or whether all of such counts state an entirely new cause of action, must be determined by a comparison of the additional counts with the amended declaration filed June 22, 1898; that they cannot be compared with the original declaration of May 7, 1898, for the reason that a demurrer was sustained to that declaration, and is not, as is said, now in the case, and is not a sufficient basis for the additional counts; also, that the amended declaration of June 22, 1898, did not state a cause of action and was fatally defective on motion in arrest of judgment, and therefore it cannot be the basis of additional counts. In determining this last question there must be a distinction made between a defective cause of action and the statement of a cause of action in a defective manner. If it is a wholly defective cause of action, it cannot be made a sufficient basis for additional counts filed after the expiration of two years; but, if the original declaration, and the amendments thereto, were merely the statement of a cause of action in a defective manner, they would be a sufficient basis for such additional counts. The original declaration in the present case alleged two separate and distinct causes of the injury; one, the want of sufficient assistance, and, the other, the negligence and incompetency of the servant in charge of the cable train. The demurrer was probably sustained on the grounds of duplicity. Either of the charges of negligence, if properly alleged and proven, might constitute a good cause of action, and a good cause of action was therefore stated, but in a defective or objectionable manner.

The amended declaration filed on June 22d alleged the incompetency or negligence of those in charge of the cable train, and it is insisted by appellant that the recovery was not upon that ground, but for failing to furnish sufficient help, and therefore the additional counts filed after the expiration of two years were barred, unless the original declaration could be made the basis for filing them. We are of the opinion that the allegation of the original declaration as to the failure of appellant to furnish necessary help was a sufficient basis for the allegations of the additional counts. The statute of limitations requiring a suit for a personal injury to be brought within two years does not apply to matters of pleading, and should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement at all. In the case of *Chicago City Railway Co. v. Hackendahl*, 188 Ill. 300, 304, 58 N. E. 930, 931, we said: "It has never been held by this court that a re-statement, in a more perfect manner, of a cause of action in an amended declaration, can be regarded as the beginning of the suit on such cause of action. As a general rule, the very purpose of an amended declaration is to state, in a more accurate and legal manner than it had been previously stated, the cause of action for which the suit was brought, and, if the rule contended for by appellant were adopted, no declaration could be amended in any substantial respect after the time limited by the statute for bringing the suit had run. The statute of limitations does not apply to matters of mere pleading, and it should not be given that effect indirectly by holding that an imperfect statement of a cause of action is no statement of it. In *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266, no cause of action whatever was stated in the original declaration, and it was held that the statute was properly pleaded to the amended declaration, which set up a good cause of action after the statute had run. If the cause of action, whether perfectly or imperfectly stated in the original declaration, had been abandoned, and a new cause of action had been stated in the amended declaration in this case, the plea would have been good; or, if not abandoned, the plea would have been good as to any new cause set up after the running of the statute. *Phelps v. Illinois Central Railroad Co.*, 94 Ill. 548. There was no error in sustaining the demurrer to the plea." And so here, if the additional counts filed after the expiration of the two years had stated some other causes of negligence than those charged in the original declaration or the amended declaration, then there would be force in appellant's contention, but, as the original declaration and all additional counts charged either the negligent operation of the cars or the want of sufficient help as the cause of the accident, we are of the opinion that the court did not err in sustaining the demurrer to the plea.

Complaint is made of the fourth instruction given on behalf of the plaintiff, to the effect that, where a master confers authority upon one of his employees to take charge and control of a

certain class of workmen, such employee, in governing and directing the movements of the men under his charge, is the direct representative of the master, and not a fellow servant, and his orders and directions, within the scope of his authority, are the commands of his master. It is insisted that this is but the statement of an abstract proposition of law not applicable to the facts of the case, and was calculated to mislead the jury. The evidence offered upon the trial refutes this contention. Appellee testified that one Jim Cross was in charge of the barns at the time of the accident, as the representative of the appellant, and that he (appellee) made complaint of the insufficiency of the help in moving the cars, and was instructed to go ahead and do it, and that the foreman would send him some help soon and look out for him. This was at least some evidence upon which to base the instruction, and it was not error to give it.

Complaint is also made of the giving of the fifth instruction on behalf of appellee, which is to the effect that, if the jury have fairly and impartially considered the evidence, facts, and circumstances in the case, and believe, from a preponderance thereof, that the plaintiff had proven his case as laid in the declaration or any count thereof, they should find the defendant guilty. It is insisted that no count in the declaration avers that the plaintiff did not know, or in the exercise of ordinary care could not have known, of the risk which caused the accident; in other words, that he did not negative the assumption of risk. It is also insisted that the instruction is in conflict with the decision of this court in *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243, 73 N. E. 373. But the facts in that case are unlike the facts in the present case. In the case at bar the allegation of the declaration is that, while appellee was engaged in switching cars over said loop and acting under the immediate direction of said defendant, etc., "said defendant carelessly and negligently ordered the plaintiff to switch said cars over said loop to their place of destination without the assistance of said servant or without any help or assistance." We have held that, where a servant is acting under the orders of the master in the performance of dangerous work, or is doing dangerous work under promise on the part of the master to furnish him a safe place or a sufficient number of servants, the servant is relieved from the assumption of risks incident to the work he is doing, and is only precluded from recovering, under the above circumstances, where the danger is so imminent that no man of ordinary prudence would engage in the work. *Chicago & Eastern Illinois Railroad Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863. In this respect the case at bar materially differs from the *Illinois Terra Cotta Lumber Co. Case*. There was no error in giving the instruction.

Complaint is next made that the verdict is not supported by the evidence. As is well known, we have nothing to do with the weight of the evidence, as that is conclusively determined by the

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finding of the Appellate Court, which in this case is against the contention of appellant. At the close of all the evidence appellant requested the court to instruct the jury to find it not guilty, which motion was overruled. The ruling of the court upon that motion would only raise the question of law whether there was any evidence in the record fairly tending to support the allegations of the declaration, which would be the only point we could consider. That question is not urged, and could not reasonably be in the light of the testimony in this record. There is certainly some evidence fairly tending to support the verdict.

We find no reversible error, and the judgment will be affirmed.
Judgment affirmed.

 McCOLLIGAN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, March 5, 1906.)

[63 Atl. Rep. 792.]

Master and Servant—Relationship.*—A master is one who stands to another in such relation that he not only controls the result of the work of that other, but also may direct the manner in which it shall be done.

Same—Servant.*—A servant is one employed to render personal services to his employer, otherwise than in the pursuit of an independent calling, and who remains under the control of the master.

Same—When Relationship Exists.*—The relation of master and servant exists when the master not only has the right to select his servant, but has power to remove and discharge him with or without cause, and to direct what work shall be done and the manner of doing it.

Same—Contract—Construction.*—Where a railroad, owning cabs, let them out to drivers for a fixed sum per day, the agreement providing that the driver should assume all liability for damages to any person or property, that he should not use a horse longer than a certain time without returning to the stable for exchange, and that he should abstain from the use of intoxicating liquors and conform to prescribed rates and regulations, the agreement further providing that the company reserved the right to cancel the unexpired term of the lease for breach of conditions, the contract was one of bailment, and not one creating a relation of master and servant.

Bailment—Torts of Bailor—Liability of Bailee.—Where, under a contract between drivers of cabs and a railroad company, the relation of master and servant was not created, but the contract was one of bailment, the railroad company was not liable for injuries sustained through the negligence of a driver.

*For the authorities in this series on the question, who are, and are not, the employees of a railroad company, see foot-notes appended to *Norfolk & W. Ry. Co. v. Bell* (Va.), 19 R. R. R. 263, 42 Am. & Eng. R. Cas., N. S., 263; foot-notes appended to *Chicago, etc., Ry. Co. v. Hamler* (Ill.), 19 R. R. R. 252, 42 Am. & Eng. R. Cas., N. S., 252; *Chicago, etc., R. Co. v. Weber* (Ill.), 19 R. R. R. 34, 42 Am. & Eng. R. Cas., N. S., 34; *Weisser v. Southern Pac. Ry. Co.* (Cal.), 18 R. R. R. 861, 41 Am. & Eng. R. Cas., N. S., 861.

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Appeal from Court of Common Pleas, Philadelphia County.

Action by Dominick McColligan against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented the following points: "(1) That, as the evidence fails to establish the relation of master and servant between the driver of the hansom and the defendant, the latter cannot be held responsible for the former's negligence, and consequently the verdict should be for defendant. (2) That upon all the evidence the verdict should be for the defendant. Answer: I affirm both points."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas James Meagher, for appellant.

Edwin J. Sellers, for appellee.

ELKIN, J. The decisive question raised by this appeal is whether, as between the defendant and the driver of the hansom, the relation was one of master and servant or of bailor and bailee. If the former, the master is liable for the negligence of the servant; if the latter, the negligence of the bailee cannot be imputed to the bailor. The contract of letting is in writing. The printed rates and regulations are made part thereof, so that the determination of the relation is a question of law for the court and not of fact for the jury.

The lease under which defendant let the hansom to the driver provides that "for and in consideration of the sum of \$4.50, and on the conditions stated below, hires to H. Priest, driver, hansom No. 65 with two horses, for 13 hours from 9:30 a. m. of the date stamped on the back of this certificate." The conditions stated therein are in substance that the driver shall assume all liability for damages to any person or property, and that he agrees not to use a horse longer than 6½ hours without returning to the stable for exchange, to wear a uniform, to abstain from the use of intoxicating liquors, to present a neat and clean appearance, to conform to the prescribed rates and regulations, and upon failure to observe these conditions the company reserves the right to cancel the unexpired term of the lease. There can be no doubt that upon its face this contract of letting establishes the relation of bailor and bailee. The learned counsel for appellant, who has ably and exhaustively presented the question, concedes that, if the case rested upon the contract alone, a bailment would result within the meaning of the law. It, however, is earnestly contended that this prima facie relation is changed by reason of the conditions, rules, and regulations, made part of the contract, to which the driver was subjected. These regulations provide in considerable detail the rates to be charged for various distances, different kinds of vehicles, and length of time used. Certain boundaries are prescribed beyond which the driver can-

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not go without permission, and he is not permitted to perform other kinds of work, such as carrying baggage and doing errands, during the term of the lease.

It is also argued that because defendant company employs a cab agent to supervise this service, to secure men for the work, make contracts with the drivers, and enforce the terms and conditions of the lease, such control is thereby exercised as to make the company liable as master. We must first consider what is necessary to establish the relation of master and servant. This question has been considered by a large number of text-writers and frequently passed upon by the courts. All authorities agree upon the following definitions of master, servant, and the relation existing between them: "A master is one who stands to another in such a relation that he not only controls the results of the work of that other, but also may direct the manner in which such work shall be done." "A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter." "The relation of master and servant exists where the employer has the right to select the employee, the power to remove and discharge him, and the right to direct both, what work shall be done, and the way and manner in which it shall be done." 20 Am. & Eng. Ency. of Law (2d Ed.) pp. 11, 12. In more concise form these definitions mean that the master directs the manner in which the work shall be done, and controls the result of the work. The servant is under the entire control, and always subject to the direction of the master. The relation exists when the master not only has the right to select his servant, but has the power to remove and discharge him, with or without cause, and to direct what shall be done and the manner of doing it.

In the case at bar the defendant company does not control the results of the work, has no rights to the proceeds arising from the fares paid drivers by passengers, and hence the fundamental and essential principle necessary to create the relation of master is lacking. The driver did not remain under the absolute direction and control of the company, and thereby cannot be said to be a servant within the meaning of the definition. The right of the master to discharge and remove the servant is incident to the relation, but in this case the abstract right did not exist. It is true the lease could be canceled for the unexpired term, but only when the conditions thereof, or some of them, had been violated. The cancellation of the lease was a contractual right, and did not arise because of the employment relations of the parties. The driver, under the contract, had legal rights enforceable against the company and only limited by the conditions therein contained. If the company undertook to cancel the lease, or remove the driver, for a reason not set out in the conditions of letting, it would be liable in damages for breach of the contract. Then, again, as has been stated, the driver is en-

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titled to all the proceeds derived from fares received from passengers who hire the cab. The aggregate of these fares may be \$5 or \$25 a day, but the company has no control over, or interest in, the results of the work in this most important respect. All of these things are inconsistent with the relation of master and servant, and indicate that of bailor and bailee.

We have, then, under the express terms of the contract, a bailment, and this relation is supported by the inferences and results just stated. As against this admittedly *prima facie* relation of bailor and bailee, we are asked to say that by reason of the conditions limiting the rates, fixing boundaries, prescribing kinds of uniforms, requiring cleanly and sober habits, and other incidental matters, the relation is not what it appears to be on its face, but is something different. The contention is not sound. The conditions and regulations, incident of the contract of letting, in some instances, it is true, are consistent with the relation of master and servant, but not inconsistent with that of bailor and bailee. If the company, in order to protect its property and give the traveling public modern conveniences and suitable accommodations, has deemed it advisable to embody in the contract of letting certain reasonable regulations, no legal or business reason can be properly assigned why the real relation of the parties should be changed thereby. The contract itself is one of bailment. The conditions are not necessarily inconsistent with this relation, and no sufficient reason is suggested why a different construction should be adopted. It is true the contention of appellant is sustained by the rule of the English cases under the metropolitan hackney carriage act. *Powles v. Hider*, 6 E. & B. 207; *Fowler v. Lock*, L. R. 7 Common Pleas, 272; *Venables v. Smith*, L. R. 2 Q. B. Div. 279; *King v. London Improved Cab Co.*, L. R. 23 Q. B. Div. 281; *Gates v. Bill*, L. R. 2 K. B. (1902) 38.

It is not difficult to distinguish the present case from the English cases either in principle or fact. The cab system of the city of London is regulated by act of Parliament. The entire system is a public service function. It is extensive in its operation, and covers a wide area within the corporate limits of the city. It is operated by a limited number of companies enjoying valuable and almost exclusive privileges. Even under these circumstances, when the question was first before the English courts in 1856, it was doubted whether the common-law relation of bailor and bailee should be changed to that of master and servant, even when indicated by act of Parliament, and the decision was largely based on the ground that the companies owning the cabs enjoyed valuable privileges, held themselves out to the public as the owners, and ought not to be permitted to deny their liability as master on this account. That the English courts did not consider the decision as resting on a firm foundation is shown by the fact that when, in 1902, the question was again before the courts for consideration in the case of *Gates v. Bill*,

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L. R. 2 K. B. (1902) 38, Lords Williams and Romer, delivering the opinion of the court said, in substance, that at common law there could be no doubt that the relation was that of bailor and bailee, and that if the question were a new one they would hesitate to draw from the provisions of the statute the inference that Parliament meant to assume the existence of the relation of master and servant so as to charge the owner with liability. In the opinion of the court there was nothing in the act which established the relation of master and servant; but, the decisions on the question having firmly established the principle, they felt themselves bound to accept the rule as the settled law of the realm.

If the English courts doubt the soundness of the rule after almost half a century had passed since its announcement, it cannot be argued with much confidence that our courts should adopt it in the first instance under conditions entirely dissimilar. We have no act of assembly regulating this matter, and hence, following the reasoning of the English courts, independent of the act of Parliament, the common-law relation of bailor and bailee exists. The cab service of the defendant company does not enjoy exclusive and special privileges. It is limited in extent. It does not perform public service functions generally, and has no rights and privileges conferred by legislative enactment. It does not belong to the class of companies organized under the hackney carriage acts of Parliament. The rule of those cases is not applicable to the facts of the present case. We are of opinion, therefore, that a proper construction of the written contract, including the conditions and regulations, under which the driver took the custody of and operated the hansom, shows that the relation established was that of bailor and bailee, and there can be no recovery in this case.

Judgment affirmed.

MUMFORD *v.* CHICAGO, R. I. & P. Ry. Co.

(Supreme Court of Iowa, Oct. 25, 1905.)

[104 N. W. Rep. 1135.]

Master and Servant—Assumption of Risk—Defective Appliances—Notice of Defect.*—The existence of defects in certain places in a railroad track is not of itself sufficient to charge a brakeman with notice of a particular defect in another place in the track.

Same—Unknown Defects.*—A railroad brakeman assumes the ordinary hazards of his employment and risks incident to defects in the track of which he has or should have knowledge, but does not assume the risk of a defect of which he does not know and which he is not in position to discover.

*For the authorities in this series on the question whether trainmen assume the risks from defective track conditions, see foot-note appended to *Northern Ala. Ry. Co. v. Shea* (Ala.), 14 R. R. R. 514, 37 Am. & Eng. R. Cas., N. S., 514.

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Same—Actions—Instructions.—In an action against a railroad for injuries to a brakeman, a charge on the issue of defendant's negligence was not erroneous because it failed, in stating the conditions of defendant's liability, to take into consideration the questions of assumption of risk, contributory negligence, and a violation of the railroad's rules.

Same.—In an action against a railroad for injuries to a brakeman, a charge that the jury should consider whether plaintiff, in the performance of his duty, should have been in the position which he was in when hurt, was, in the absence of a request for a more specific instruction, sufficient on the effect of a rule of the railroad prohibiting the backing of trains over public crossings without a man on the leading car.

Same—Assumption of Risk—Knowledge of Defect.†—The doctrine of the assumption of risk is based on the servant's knowledge, actual or implied, of the defect which caused the injury, and consent or the equivalent thereof, and, in the absence of such knowledge on the part of the servant, there can be no assumption of risk.

Same—Restriction of Right of Action—Validity of Contract.‡—A provision in a contract between a railroad and a brakeman that, in consideration of employment, the brakeman agrees to give the railroad notice of personal injuries sustained by him while in the railroad's service within 30 days after receiving such injuries, and that his failure to give such notice in the manner and within the time specified shall be a bar to an action therefor, is in violation of Code, § 2071, providing that railroads shall be liable for damages sustained by employees or others in consequence of the neglect of agents or other employees of the railroad, and that no contract which restricts such liability shall be legal or binding.

Constitutional Law—Restriction of Contract Right.—Code, § 2071, providing that railroads shall be liable for damages sustained by employees or others in consequence of the neglect of agents or other employees of the railroad, and that no contract which restricts such liability shall be legal or binding, is within the legislative power to enact, and is not an unconstitutional interference with the liberty of contract.

Appeal from District Court, Scott County; J. W. Bollinger, Judge.

Action at law to recover damages for personal injuries received by plaintiff while acting as a brakeman on one of defendant's trains. The alleged negligence consisted of defects in a side track or switch over which plaintiff was riding, rapid and unsafe speed of the train, and failure to provide a sufficient

†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Dunn v. Oregon Short Line R. Co.* (Utah), 16 R. R. R. 741, 39 Am. & Eng. R. Cas., N. S., 741; foot-notes appended to *Southern Pac. Co. v. Gloyd* (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to *Southern Ry. Co. v. Logan* (C. C. A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374; foot-notes appended to *Philadelphia, etc., R. Co. v. Devers* (Md.), 16 R. R. R. 366, 39 Am. & Eng. R. Cas., N. S., 366.

‡For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Eckert v. Pennsylvania R. Co.* (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475; *Baltimore & O. R. Co. v. Hubbard* (Ohio), 16 R. R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71; *Smith v. Chicago, M. & St. P. Ry. Co.* (Wis.), 15 R. R. R. 180, 38 Am. & Eng. R. Cas., N. S., 180.

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number of employees to assist in the work. Defendant's answer was a general denial, a plea of assumption of risk, and a contract bar of the right of action. On these issues the case went to trial to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Carroll Wright and Cook & Dodge, for appellant.
Ely & Bush, for appellee.

DEEMER, J. For a reversal of the judgment defendant relies upon five propositions, three of them based upon instructions given and refused, and two upon questions of fact; that is to say, that the verdict is without support, and that the trial court should have directed a verdict in defendant's favor. That the track over which the car upon which plaintiff was riding, and from which he claims he was thrown, was in a dangerous and defective condition, is so well established that defendant's counsel in their opening argument make no question as to defendant's negligence. The contentions in this respect are that plaintiff had knowledge of the defect and assumed the risk; that he was guilty of contributory negligence, and at the time he was injured was violating a rule of the company. This rule provided that "in no case must a train be backed over, nor cars cut from engine and run over, a public crossing or highway, unless there is a man on the leading car, who at night must display a light." The jury was authorized to find that plaintiff was thrown from a box car upon which he was riding by reason of a sudden and severe jolt or jar to the car, caused by a defective switch track in the city of Des Moines; that he had never been over this track before in the daytime, and had never ridden a car over the defective portion of the track at any time; that he had no knowledge of the defect, and had never been in a position where he could reasonably have discovered it. That there may have been defects in defendant's track at other places is not in itself sufficient to charge plaintiff with notice of the particular defect complained of. Plaintiff did not know of this defect, and was in no position, so far as shown, to have acquired knowledge of it. At least the jury was authorized to so find. *Pierson v. R. R.* (Iowa) 102 N. W. 151, is squarely in point on this proposition. Plaintiff, of course, assumed the ordinary hazards of his employment, but not the risks incident to such defects in the track as were here disclosed, unless he had knowledge thereof. If he knew, or should in the exercise of ordinary care have known, of these defects, and continued to work over them without protest, he assumed the hazard. This matter of assumption of risk was clearly for the jury, and was properly submitted to them under approved instructions.

2. Instruction No. 13 given by the trial court reads in part as follows: "In other words, defendant is not liable in this case unless plaintiff was injured by being jarred or jolted off the side of the car, as he claims, while he was riding there with one foot

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in the stirrup and one on the journal box." This is complained of because it is said it runs counter to the rule of assumption of risk already mentioned, and authorized the jury to return a verdict in plaintiff's favor if he was injured while riding as stated in the instruction. It is argued that the instruction entirely eliminated defendant's rule before quoted, and that, if plaintiff was riding as stated in the instruction, he was guilty of contributory negligence as a matter of law. The instruction quoted is a mere excerpt from instruction 13, which according to its very terms had reference to the question, "Was plaintiff injured by reason of defendant's negligence?" It is unfair to the trial court to single out this paragraph as stating the entire case, and claim error on account thereof. In the connection in which it was used it was absolutely correct; for the reason that, if plaintiff was not injured by being jarred from the car as he claimed, he was not injured by defendant's negligence. The questions of assumption of risk, plaintiff's contributory negligence, etc., were fully covered in other instructions, which save as hereinafter noted are not complained of. Moreover, we do not think that any such violation of the defendant's rule was shown as to justify an instruction with reference thereto. But, conceding *arguendo* that we are wrong in this, the trial court instructed the jury that they should consider whether or not plaintiff in the performance of his duty should have been in the position he was when hurt. In the absence of request for a more specific statement as to the effect of defendant's rule, this was all that was required.

3. Another instruction reads in this wise: "(20½) Another question on the subject of assumed risk is, was the joint in the track in the condition of ordinary loose joints on defendant's line of railroad? Or was it of a more serious or dangerous character than the ordinary loose joint on said railroad? You are instructed that, in assuming all the ordinary risks of danger in his employment, the plaintiff assumed all the risks of danger from ordinary loose joints such as the evidence shows are frequently found in defendant's line of track. If you find a loose joint caused the accident, that it was not known to the plaintiff to have existed there, or would not have been known, had he exercised ordinary care, and that it was not an ordinary loose joint, but was of a more serious and dangerous character than an ordinary loose joint, then the plaintiff did not assume the risk of any danger caused by said joint. You must decide the question of assumed risk from the evidence in the case." This is complained of as announcing an incorrect rule of law. As applied to the facts, we think it was correct. Plaintiff must have known, or in the exercise of ordinary care should have known, of the defect which caused his injury, in order that he may be held to have assumed the risk. That he knew of other defects, even of a similar nature, is not conclusive, although evidence, perhaps, that he knew or should have known of the particular

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defect complained of. The entire doctrine of waiver or assumption of risk is based upon knowledge, actual or implied, and consent or the equivalent thereof; that is to say, if the injured party in the exercise of ordinary care should have known of the defect, he in law is held to a knowledge thereof. If with knowledge, actual or implied, he continues in his master's employ without protest and promise of repair, he is held to have acquiesced in, consented to, and assumed the risk. But without this knowledge, actual or implied, there can be no waiver. The instruction was correct. *McCauley v. Car Co.* (Mass.) 47 N. E. 1006, relied upon by appellant, is not in point.

4. We come now to the principal point relied upon by the defendant for a reversal of the judgment. In plaintiff's application for employment which he made to the company we find this printed provision: "In further consideration of such employment, I agree that if, while in the service of said company, I sustain any personal injury for which I shall or may make claim against the company for damages, I will, within 30 days after receiving such injury, give notice in writing of such claim to the general claim agent of said company, at Chicago, for injuries occurring in Illinois or Iowa, and to the general attorney at Topeka for injuries occurring elsewhere upon the system, which notice shall state the time, place, manner, and cause of my being injured, and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly, and promptly investigated; and my failure to give written notice of such claim, in the manner and within the time aforesaid, shall be a bar to the institution of any suit on account of such injuries." For various reasons, plaintiff did not comply with these provisions, and defendant pleaded his failure to do so as a complete bar to the action. Plaintiff contended, and now argues, that this agreement is in plain contravention of section 2071 of the Code, which we shall presently quote, and is therefore void, while defendant says that this section has no application, and that, if it does, the section is unconstitutional, in that it interferes with the liberty of contract guaranteed by the fundamental law. The section reads as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof; and in consequence of the willful wrongs whether of omission or commission of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding." The trial court held the provisions of the application quoted invalid, and did not submit any issue raised by the pleadings with reference to this feature of the case. While there may have been other grounds for not presenting this matter, we are precluded

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by the record from passing upon them, and must on this appeal determine the correctness of the trial court's rulings. The statute clearly makes any contract restricting liability invalid; that is to say, any contract which restricts the liability imposed by the statute is invalid. What is that liability? It is to pay without condition all damages sustained, etc., in consequence of the neglect of agents or the mismanagement of engineers or other employees. This liability exists until barred by the statute of limitations, and is not dependent upon any conditions precedent or subsequent. Does the provision in plaintiff's application restrict this liability? To restrict is to restrain within bounds; to limit; to confine. Webster's Unabridged Dict. tit. "Restrict."

As we understand counsel's argument, they admit that this provision does limit plaintiff's recovery. Indeed, this proposition is hardly debatable. But they say that, as the restriction relates to the remedy and does not affect the right, it does not come within the purview of the statute. In other words, they say it relates to the adjective—the remedial—rather than to substantive rights, and that the section does not apply, in that the liability still remains if the remedy provided for in the application is followed. This argument is specious, but we do not regard it sound. The provision quoted does limit the liability created by statute. It creates a contract bar, which would not exist but for the contract. It imposes new duties upon an injured party which he was not obligated by law to perform. It attaches a penalty for not doing these acts, which did not theretofore exist. It restrains defendant's liability within bounds fixed by the contract itself. Moreover, we have expressly held that these contract limitations not only bar the remedy but extinguish the right; that is to say, limit the right. *Farmers' Ins. Co. v. State Ins. Co.*, 112 Iowa, 608, 84 N. W. 904. That case, which is abundantly supported by authority, effectually disposes of one of appellant's propositions. See, also, *McGahey v. State*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304; *Gulf Co. v. Trawick* (Tex. Sup.) 4 S. W. 567, 2 Am. St. Rep. 494; *Ohio Co. v. Taber*, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685; *Grieve v. Railroad*, 104 Iowa, 659, 74 N. W. 192; *McMillan v. Express Co.*, 123 Iowa, 236, 98 N. W. 629; 6 Cyc. pp. 505, 506, and cases cited. No case has been cited holding to the contrary, and we doubt if any such can be found.

But it is argued in this court, and apparently for the first time, that section 2071 is unconstitutional, because it interferes with what has been called the liberty of contract; and the late case of *Lochner v. People*, 25 Sup. Ct. 541, 49 L. Ed. 937, is cited in support of the contention. We do not understand that the learned tribunal deciding that case, by a majority of a single vote, intended to overrule the many cases sustaining the validity of such statutes as the one here in question. If it did, the power of the Legislature is so seriously crippled that it is well-nigh impotent. We shall assume that the Legislature still pos-

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sesses its police power, that it may within certain limits regulate common carriers, that it still possesses some power over corporations of its own creation, and that it may legislate for the general welfare of the community. No one has as yet questioned these matters as we understand it. The constitutionality of this act was affirmed at a very early day in this state. See *McAunich v. Railroad Co.*, 20 Iowa, 338. This case has been followed many times, and other tribunals have consistently followed it. See *Powell v. Sherwood* (Mo. Sup.) 63 S. W. 485; *O'Brien v. Railroad* (C. C.) 116 Fed. 502 (for a full collation of the cases and an able discussion of the principles involved); *Tullis v. Railroad Co.*, 20 Sup. Ct. 136, 44 L. Ed. 192; *Railroad Co. v. Humes Co.*, 6 Sup. Ct. 110, 29 L. Ed. 463. The federal Supreme Court has many times upheld such statutes, and we shall not overrule these cases on the strength of the *Lochner* Case alone. See *Railroad Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. There is no such thing as absolute liberty of contract. Indeed, all personal and property rights are subject to proper legislative regulation and control. Every man surrenders a part of his liberty for the benefits and enjoyment of organized society. No one may do absolutely as he pleases. A very great proportion of our legislation is a restriction on some one's liberty. Indeed, the liberty of which we boast and are so justly proud is liberty under law, and not absolute license. It is freedom frequently restrained by law for the common good. Surely a corporation, created by the state and engaged in an extrahazardous business, may be compelled to respond in damages for the negligence of its employees, notwithstanding any contract it may make or attempt to make relieving itself from such responsibility or restricting its liability therefor. These reflections are commonplace enough, but they are sometimes forgotten. It is well to recur to them again when such attacks as this are made upon legislative power. Further argument, in view of the authorities cited, is unnecessary. We have no doubt of the power of the Legislature to enact such a law, and are convinced that the provision of the application in question is an attempt to "restrict liability."

Some other questions are made in a supplemental brief filed for appellant, which were not presented in opening argument, and do not, with one exception, appear to have been made in the trial court. That exception presents nothing new for discussion, and we do not therefore consider it.

There is no prejudicial error in the record, and the judgment must be, and it is, affirmed.

KLUNK *v.* HOCKING VALLEY RY. CO.

(Supreme Court of Ohio, April 3, 1906.)

[77 N. E. Rep. 752.]

Master and Servant—Defective Appliances—Negligence—Instructions.—On the trial of an action against a railroad company brought by a locomotive fireman for personal injuries received by him in consequence of a defect in the water gauge glass attached to the locomotive upon which he was employed, an instruction, that to overcome the effect of the prima facie evidence of negligence arising from proof of such defect, "the defendant company is required to satisfy the jury by a preponderance of the evidence that it was not negligent," is erroneous.

Same—Burden of Proof.—In such action the burden of proving, by a preponderance of the evidence, the particular negligence alleged, is at all times upon the plaintiff, and while proof of facts sufficient under the statute (section 3365-21, Rev. St. 1906), to create a prima facie presumption of negligence against the defendant casts upon it the burden of producing evidence of equal weight or countervailing force, in order to control or destroy such presumption, yet proof of such facts does not impose upon the defendant the burden of establishing affirmatively, by a preponderance of the evidence, that it was not negligent.

Evidence—Burden of Proof.—The rule is that he who affirms must prove, and when the whole of the evidence upon the issue involved leaves the case in equipoise, the party affirming must fail.

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

Action by William H. Klunk against the Hocking Valley Railway Company. Judgment for plaintiff in the common pleas was reversed in the circuit court, and plaintiff brings error. Affirmed.

Suit was brought by the plaintiff in error, William H. Klunk, in the court of common pleas of Franklin county, Ohio, against the defendant in error, the Hocking Valley Railway Company, to recover damages for an alleged personal injury sustained by him while in the performance of his duties as an employee of said railway company, in the capacity of locomotive fireman. In his petition, as and for his cause of action, plaintiff alleged that: "On the thirteenth day of January, 1902, the plaintiff was in the defendant's employ in the capacity of a locomotive fireman, and then and there performing the duties incident to such employment upon engine No. 222 on a south-bound siding just north of Marion, Ohio. That said engine was then and there the property and machinery of the defendant company; that said defendant then and there disregarded its duty to furnish a safe and secure engine, and conducted itself so carelessly and negligently and unskillfully in this behalf that it provided an unsafe, defective and insecure appliance to said engine and boiler, to wit, a worn and defective water glass or water glass gauge; that said gauge had become worn with age until the same was unfit and unsuited for said purposes as the defendant well knew, or by the use of

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reasonable caution and care should have known, but of which the plaintiff did not know and had not the means of knowing. In consequence of said negligence of said defendant, then and there, while plaintiff in said capacity of fireman, was performing the duties of said fireman upon said engine, then and there in the defendant's service, and wholly without any fault or neglect of said plaintiff, the said water glass, by reason of said unsafeness, defectiveness and insecurity, burst and broke into many pieces, and one of the fragments thereof was then and there hurled into the eyeball of the plaintiff's left eye, by reason thereof plaintiff became sick, ill and unable to do any work for five weeks and incurred an expense of \$. in medical and other attendance in attempting to be cured, and completely lost the sight of his said left eye and is permanently injured thereby and therein to his damages in the sum of \$10,000, for which he asks judgment." The defendant railway company in answer to said petition, among other defenses, pleaded the general denial, assumption of risk, and contributory negligence on the part of plaintiff. The trial in the court of common pleas resulted in a verdict and judgment for the plaintiff. On error, this judgment was reversed by the circuit court, on the sole ground that the trial court erred in its instructions to the jury. To obtain a reversal of this judgment of the circuit court, the present proceeding in error is prosecuted in this court.

F. S. Monnett and Pugh & Pugh, for plaintiff in error.

C. O. Hunter, for defendant in error.

CREW, J. (after stating the facts). On the trial of this cause in the court of common pleas, at the request of counsel for the plaintiff, William H. Klunk, the court gave to the jury the following special instruction: "If you should find from the preponderance of the evidence that the plaintiff was injured as stated in his petition and that he received the injury by reason of any defect in the water gauge or glass attached to the locomotive while he was acting as an employee of the defendant company, then the defendant is deemed to have knowledge of such defect and the fact of such defect is prima facie evidence of negligence on the part of the defendant company. This means that, in the absence of any other evidence in the case bearing on the knowledge of the defendant company it would require you to presume that the defendant was negligent. If such presumption arose in the case to overcome the effect of the knowledge so presumed by the statute, the defendant company would have to show that in fact it did not have such knowledge and could not have had it by the exercise of reasonable care, and that it used due diligence to ascertain and remedy the defect, or to put it another way, the burden of overcoming the presumption or inference of negligence rested upon the defendant company and it was required to satisfy you by a preponderance of the evidence that it was not negligent."

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In the general charge the court further instructed the jury as follows:

"If you find from the evidence that said water glass was then and there defective, and that plaintiff received said injuries in consequence thereof, then such is prima facie evidence of negligence on the part of the defendant. This, however, does not preclude the defendant from rebutting such prima facie evidence of negligence by showing that it had not in fact knowledge of the defect, and that it was not guilty of negligence.

"In order to overcome such presumption the defendant must show, by a preponderance of the evidence, that it did not at the time of the bursting and breaking of said water glass have such knowledge, and that it could not have obtained such knowledge by the use of ordinary care, skill, and diligence."

Each of the above instructions was held and adjudged by the circuit court to be erroneous in that, each imposed upon the railroad company the obligation of producing a preponderance of evidence in order to meet and rebut the prima facie presumption of negligence raised against it by the statute, upon proof of certain facts by the plaintiff. The correctness of this judgment of the circuit court is the sole question presented by the record in this case, for determination by this court. It is claimed by counsel for plaintiff in error in support of the instructions given, that the same were fully authorized and warranted in the present case by section 3365-21, Rev. St. 1906. This section applies to railroad corporations only, and is as follows: "It shall be unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employee of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated, or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employee, or his legal representatives, against any railroad corporation for damages, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation." Undoubtedly the effect of this statute is to create a prima facie presumption of negligence against the railroad corporation whenever, in an action brought by an employee against such corporation for damages on account of an injury received, it shall be made to appear that the injury complained of, resulted from and was occasioned by some defect in a car or locomotive or the machinery or attachments thereto belonging, owned, run or operated by said corporation at the time of such injury. But while the effect of this statute, in the cases to which its provisions apply, is to so

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modify the rules of evidence as to make the proof of such defect prima facie evidence of negligence on the part of the corporation, yet this statute neither changes nor affects the rule as to the quantum or degree of evidence sufficient or necessary to rebut and control the prima facie case thus raised. The general rule would seem to be well established by an almost unbroken line of authority, that to rebut and destroy a mere prima facie case, the party upon whom rests the burden of repelling its effect, need only produce such amount or degree of proof as will countervail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose, counterbalance the evidence by which the prima facie case is made out or established, it need not overbalance or outweigh it.

Chief Justice Deemer in *Gibbs v. Bank*, 123 Iowa, 742, 99 N. W. 705, states the rule thus: "When a prima facie case is made out by presumption or otherwise, in order to destroy its effect and shift the burden of producing further evidence the party denying it must produce evidence tending to negative the claim asserted to a point where, if no more testimony is given, his adversary cannot win by a preponderance of the evidence. *Smith v. Sac County*, 11 Wall. (U. S.) 139, 20 L. Ed. 102; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *M. P. R. R. v. Brazzil*, 72 Tex. 233, 10 S. W. 403. It is clearly a misnomer of terms to say that the burden of proof swings like a pendulum from one side to the other during the progress of a trial. All that is meant is that the duty of introducing evidence to meet a prima facie case shifts back and forth. *Pease v. Cole*, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53. The burden of proof at all times rests upon him who affirms. 1 Taylor on Evidence (9th Ed.) 276; Am. Notes, 12; *Willett v. Rich*, 142 Mass. 360, 7 N. E. 776, 56 Am. Rep. 684; *Heinemann v. Heard*, 62 N. Y. 448." In *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871, Hayne, C., commenting upon an instruction given by the trial court in that case, touching the quantum of evidence necessary to rebut a prima facie case, says: "We think that the court erred in telling the jury that the defendant was required to have a preponderance of testimony upon the question mentioned. The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of evidence. These burdens are often on the same party. But this is not necessarily or always the case. And it is by no means safe to infer that because a party has the burden of meeting a prima facie case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counterbalance the evidence adduced against him."

Perhaps one of the best statements to be found of the rule now under consideration, is that given by Chief Justice Shaw in *Powers v. Russell*, 13 Pick. (Mass.) 76, as follows: "It may be

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useful to say a word upon the subject of the burden of proof. It was stated here that the plaintiff had made out a prima facie case, and, therefore, the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore, the other party, if he would avoid the effect of such prima facie case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate." The rule as announced in the authorities above cited finds additional support in the following cases: *Lamb v. Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Atkinson v. Goodrich Transportation Co.*, 69 Wis. 5, 31 N. W. 164; *Heinemann v. Heard et al.*, 62 N. Y. 448; *Willett v. Rich*, 142 Mass. 356, 7 N. E. 776, 56 Am. Rep. 684; *Cass v. Boston & Lowell Railroad Co.*, 14 Allen (Mass.) 448; *Polstein v. Blauner* (Sup.) 86 N. Y. Supp. 794; *Central Bridge Corporation v. Butler*, 2 Gray (Mass.) 130. In the present case the cause of action pleaded and relied upon by plaintiff, is grounded solely upon the alleged negligence of the defendant railway company. The general denial in the answer of the railway company put in issue every allegation of fact in the petition, necessary to establish in the plaintiff a right to recover, and the allegation of negligence being the allegation of a material and affirmative fact, the burden, at all times, was upon the plaintiff to establish such fact by a preponderance of the evidence. "During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it prima facie, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is, that there is a necessity of evidence to answer the prima facie case or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial." *Heinemann v. Heard*, supra.

Whether, in the case at bar, the defendant railway company was guilty of such negligence as would create a liability against it depended upon the whole of the evidence, as well that, which by force of the statute constituted a prima facie case against the defendant, as all the other evidence produced by plaintiff tending to corroborate, and by the railway company tending to rebut, the charge of negligence made against it. And if upon the whole case defendant's negligence was not established by a preponderance of the evidence, or if upon all the evidence adduced upon that issue, the case was left in equipoise, the defendant was entitled to a verdict, and the jury should have been so

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charged. Instead, the jury was instructed by the trial judge, that to overcome the presumption or inference of negligence raised against it by the statute, the defendant company "was required to satisfy you by a preponderance of the evidence that it was not negligent." This, we think, for the reasons above stated, was clearly misleading and erroneous.

The case of *Railway Company v. Erick*, 51 Ohio St. 146, 37 N. E. 128, is not in conflict with the authorities above cited, nor inconsistent with the views herein expressed. In that case, as stated in the opinion, all the requests to charge, were based on the law as it stood prior to the enactment of section 3365-21, Rev. St. 1906. And while the court there determined, that the effect of this enactment was, certain facts being made to appear, to raise a prima facie presumption of negligence against the company, and to impose upon it the burden of answering and rebutting by proof, the presumption, or prima facie case so created. Yet, the question of the degree of evidence necessary to be produced by the defendant company, in order to meet and overcome the presumption, or prima facie case so raised, was neither discussed nor determined.

We find no error in the record and judgment of the circuit court, and its judgment is therefore affirmed.

SHAUCK, C. J., and PRICE, SUMMERS, SPEAR, and DAVIS, JJ., concur.

HORRIGAN v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, March 2, 1906.)

[77 N. E. Rep. 634.]

Master and Servant—Injuries to Servant—Negligence of Master.—

Where a grating was removed from the floor, without the master's authority, by a fellow servant of one who fell through the opening, this did not constitute negligence on the part of the master.

Report from Superior Court, Suffolk County.

Action by Timothy Horrigan against the Boston Elevated Railway Company for personal injuries. Verdict for defendant. Heard on report from superior court. Judgment on the verdict.

Timothy W. Coakely, Daniel H. Coakely, Joseph A. Dennison, Roland H. Sherman, and Chas. Calvin Johnson, for plaintiff.

Endicott P. Saltonstall, for defendant.

HAMMOND, J. There was no evidence of the negligence of the defendant. The plaintiff did not contend that the grating was a defect in the floor. It was there properly as a ventilator, and was not intended for any other purpose. It was removed without the defendant's authority, by the plaintiff's fellow employee, who carelessly neglected to replace it. The defendant, as against the plaintiff, was not bound to anticipate that it would be so used.

Judgment on the verdict.

MOORE v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1, Feb. 22, 1906.)

[91 S. W. Rep. 1060.]

Master and Servant—Personal Injuries—Defective Rail—Evidence—Question for Jury.—In an action by a street car conductor for injuries resulting from the derailling of the car because of an alleged defective rail, evidence held sufficient to justify submission to the jury of the question of defendant's negligence.

Same—Combined Negligence of Master and Fellow Servant.*—A master is liable to a servant injured by the master's negligence, even though the negligence of a fellow servant contributed to the result.

Same—Contributory Negligence—Street Car—Excessive Speed—Responsibility of Conductor.—Where a street car conductor was injured through the derailment of the car because of an alleged defective rail, the fact that the car was at the time running at an excessive rate of speed and might not have left the track had it been running slower did not show the conductor to be guilty of contributory negligence, since, though he had general control of the car, it was not within the scope of his duty to regulate the speed at all times.

Trial—Instructions—Assumption of Fact in Issue.—In an action by a street car conductor for injuries from the derailment of the car because of an alleged defective rail, an instruction that if the jury believed that plaintiff was injured by reason of the car leaving the track on account of a defective rail, and not because of any fault on his part, they should find for plaintiff, etc., was not objectionable on the ground that it assumed that the rail was defective.

Master and Servant—Injuries to Servant—Violation of Ordinance—Contributory Negligence.—Where a master's orders require a servant to violate an ordinance, the master cannot, in action by the servant for injuries, claim that the violation of the ordinance constituted contributory negligence.

Trial—Instructions—Ignoring Issues.—In an action by a street car conductor for personal injuries from the derailment of a car through an alleged defective rail, in which there was evidence that the car was running at an excessive rate of speed, but also evidence that that rate of speed was required by the schedule time, an instruction implying that plaintiff could not recover if he was in control of the car and if it was being run at a greater speed than was allowed by ordinance was erroneous, because ignoring the question of defendant's orders as to speed.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Bascom Moore against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*See foot-notes appended to Fuller v. Tremont Lumber Co. (La.), 17 R. R. R. 710, 40 Am. & Eng. R. Cas., N. S., 710; foot-notes appended to Cole v. St. Louis Transit Co. (Mo.), 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583; foot-note appended to Gila Valley, etc., Ry. Co. v. Lyon (Ariz.), 16 R. R. R. 745, 39 Am. & Eng. R. Cas., N. S., 745; foot-notes appended to Virginia & S. W. Ry. Co. v. Bailey (Va.), 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795.

Moore v. St. Louis Transit Co

Boyle, Priest & Lehmann, Geo. W. Easley, and Edward T. Miller, for appellant.

Ernest E. Wood, for respondent.

VALLIANT, J. Plaintiff was in the service of the defendant in the capacity of a street car conductor. On August 20, 1902, the car on which plaintiff was serving jumped the track and turned over, throwing him out and severely injuring him. The amended petition charges that the accident was caused by a "broken, worn, and defective rail" in defendant's track, of which defendant had or ought to have had notice and negligently failed to repair.

The testimony for the plaintiff tended to prove as follows: The defendant has a double-track street railroad along Grand avenue. Going south there is a curve towards the east in the tracks to conform to the curve of the street, extending from Alberta to Osage street. It is not a sharp curve, as if turning at a right angle into a cross-street, but a long curve, the precise angle of which was not shown. On August 20, 1902, the car on which plaintiff was conductor was going south. When it struck this curve it jumped the track, and after running along on the ground for the length of the car or more it turned over on its side. It was a summer car with crosswise seats. The plaintiff was standing between the second and third seats from the rear, he was thrown to the ground, and part of the car fell on him and inflicted serious injuries, the details of which it is unnecessary to mention, since no point on that account is made in the brief of appellant. The rail in the track at that point was much worn—rounded, as one witness said; flattened, as another said; badly worn, as others expressed it—rendering it less capable of holding the car, and liable to cause such an accident. Several other cars had shortly before this been derailed as this was at that point. This condition had existed for two months or more, and was known for that length of time to the defendant's roadmaster, who had called the attention of some of the motormen to it and had cautioned them to be careful to run slowly through that curve. Cars could be run, using care, at a rate of 6 or 8 miles an hour, safely through the curve, and the plaintiff had for months past been daily going through it safely with his car, and had done so several times that day. Not all of the plaintiff's witnesses testified that the rails were badly worn; some of them said they were only slightly worn; one said that even a new curve rail would, in a short while, become slightly worn. At the time of the accident this car was running 10 or 12 miles an hour, but it was within the schedule time. The motorman testified that as he approached the curve he slowed down. He did not state just how fast he was going when he struck the curve, but did say it was over 6 miles an hour and faster than a man would walk.

Defendant introduced in evidence the original petition of the plaintiff, in which, in addition to the defective rail as charged in the amended petition, it was alleged that the car was running

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at the rate of 25 miles an hour in violation of a city ordinance forbidding it to run faster than 8 miles an hour, and also that the car was defective. Defendant also introduced the city ordinance referred to, and the following rules of the company: "Reduce speed of car to a walk before entering a curve," etc. "The conductor will have full charge of the car when on duty, excepting such work as pertains to the care and operation of the motor, and the motorman is expected to obey his orders by bell or otherwise." Defendant also introduced evidence tending to show that the rails at that point were but slightly worn, and cars could and did safely pass through the curve at a rate of 6 or 8 miles an hour. An expert witness for defendant testified that, if a car running 10 or 12 miles an hour should be derailed going into a curve, it would be owing to the speed of the train, and would not indicate a defective rail.

At the close of the plaintiff's case, and again at the close of all the evidence, the defendant asked an instruction looking to a nonsuit, which was refused, and exception taken. The trial resulted in a verdict for the plaintiff for \$5,000, and defendant appealed.

1. There was substantial evidence tending to show that the proximate cause of the accident was the defective rail; and whilst the evidence also shows that, even with the defect, the car could have been moved through the curve if care had been taken to sufficiently slow down the speed before striking the defective rail, yet there was sufficient evidence to justify the jury in concluding that there would have been no accident if the rail had been in proper condition. Conceding that the motorman was negligent in running into the curve faster than he should (although that does not clearly appear), still there is nothing in the plaintiff's evidence to show that the rate at which he was going would have produced the result if the rail had been in proper condition. If the motorman was negligent in this respect, the most that can be said of it is that his negligence united with that of the defendant to cause the accident. A master is liable to his servant who is injured by the master's negligence, even though the negligence of a fellow servant of the one injured contributed to the result. *Cole v. Transit Co.*, 183 Mo. 81, loc. cit. 94, 81 S. W. 1,138, and cases there cited. If the car was run into the curve at a rate of speed that was, under the circumstances, negligent, it was not the fault of the plaintiff, the conductor, because although under the rules of the company he had general charge of the car, yet it was not in the nature of his duties to direct the speed of the car at every point. His duties were to be elsewhere than on the front platform, and otherwise than observing the track and noting when to slow down and when to increase speed. Those duties in their detail naturally belonged to the motorman, and by the rules of the company read in evidence were expressly excepted from the duties of the conductor. It may be that the conductor would have authority,

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when a condition arose that required it, to order the motorman to slow or speed the car, but such authority would not imply that he was expected to direct the speed of the car at every point, or when there was nothing especial arising to call for an interposition of his authority. The negligence of the motorman, therefore, if there was such negligence, was not the negligence of the conductor. The court did not err in refusing the instruction looking to a nonsuit.

2. At the request of the plaintiff the court gave this instruction: "The court instructs the jury that if they believe from the evidence that plaintiff was employed as a conductor on one of the cars owned and operated by the defendant, and that he was injured by reason of the car leaving the track on account of a defective rail of the said track, and not through or on account of any fault on his part, they should find in favor of the plaintiff and against the defendant, provided they further find that the defendant company knew, or could by the exercise of ordinary care have known, of the existence of the defective rail on the said track for a sufficient length of time prior to the accident for them to have made necessary repairs." This was the only instruction given that informed the jury as to what facts were necessary to be found in order to authorize a verdict for the plaintiff, the chief of which was that the car left the track on account of a defective rail. There were 10 instructions given at the request of the defendant, in one of which the jury were expressly told that the only negligence charged was the defective rail and failure to repair it within a reasonable time after notice, and unless they found that defendant was guilty of that negligence the verdict could not be for the plaintiff, although the jury should find that defendant was negligent in some other respect. These instructions took the mind of the jury away from all other questions of defendant's negligence except that relating to the alleged defective rail.

The criticisms that appellant makes of the instruction given at the request of the plaintiff are (a) that it assumes that the rail was defective; (b) it leaves out of view the negligence of the motorman; (c) that it conflicts with instructions 4 and 5 given for defendant. The instruction is not subject to the interpretation that it assumes that the rail was defective. It leaves that fact to be found from the evidence, and makes its finding essential to the plaintiff's right to recover. It does leave out of view supposed contributory negligence of the motorman and charges the plaintiff with the consequence of his own fault only, if any is found, and in that the instruction is correct. And this instruction does conflict with instructions 4 and 5 given for defendant; but those instructions were wrong. They told the jury that if the car was under the control of the plaintiff as conductor, or under the joint control of the conductor and motorman, and was being run at a greater speed than the ordinance allowed, and that the speed contributed to the derailment, the

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plaintiff could not recover. Those instructions not only hold the plaintiff liable for the contributory negligence of his fellow servant, but imply that it was the plaintiff's duty to see that the ordinance was obeyed without reference to what his master's orders in that respect might have been. There was some evidence tending to show that 15 miles an hour was the schedule time on that part of Grand avenue. When it is a question between the master and the servant, the master cannot hold the servant responsible for obeying his own order. An instruction, therefore, assuming it to be the servant's duty to obey the city ordinance, should not, in a suit between the master and the servant, ignore a question of the master's order on the subject, if there was evidence on that point.

We find no error in the record of which the appellant can complain. The judgment is affirmed. All concur.

UNION PAC. R. CO. *v.* BROWN.

(Supreme Court of Kansas, March 10, 1906.)

[84 Pac. Rep. 1023.]

Negligence—Trial—Question for Court or Jury.—When the facts, upon which a question of negligence depends, are in dispute, the question is one to be answered by the jury under proper instructions; but where the facts are not in dispute and only one inference or deduction is to be drawn from them it presents a question of law for the courts. *Dewald v. K. C., Ft. S. & G. R. Co.*, 24 Pac. 1101, 44 Kan. 586.

Carriers—Negligence.*—When a passenger train of vestibuled coaches is approaching near to a depot station where passengers are to leave the train, and after the brakemen have called the name of the station to passengers who may desire to alight, it is not negligence for the trainmen to open the side door and the floor door of a vestibuled coach, and to leave them till the station is reached.

(Syllabus by the Court.)

Error from District Court, Dickinson County; O. L. Moore, Judge.

Action by Eleranda A. J. Brown against the Union Pacific Railroad Company. Judgment for plaintiff, defendant brings error. Reversed.

This action was brought by defendant in error against the plaintiff in error to recover damages for the negligence of the railroad company and its employees resulting in the death of her husband, J. W. Brown. A trial was had to a jury which returned a verdict in favor of the plaintiff, Mrs. Brown, for \$1,000 dam-

*For the authorities in this series on the subject of a carrier of passengers' duties and liabilities with respect to opening and closing car doors, see foot-notes appended to *Weinschenck v. New York, etc., R. R.* (Mass.), 19 R. R. R. 722, 42 Am. & Eng. R. Cas., N. S., 722.

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ages. Each party filed a motion for a new trial both of which were overruled, and judgment in accordance with the verdict was rendered against the company, and it brings the case here for review.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error.

E. C. Little (S. S. Smith, of counsel), for defendant in error.

SMITH, J. The husband of plaintiff below was returning from Kansas City to his home station, Abilene, in a train of vestibuled coaches on the Union Pacific Railroad. Within a short distance of the station at Abilene the whistle was sounded, and a brakeman went through the smoking car, at least, and called the name of the station. A witness, who had been asleep in the smoking car, was awakened by the whistle, or by the call of the brakeman and arose, put on his overcoat, and went to the rear end of that car and, looking through the glass in the rear door of the car, saw the deceased standing within the vestibule of the smoking car and also saw that the side and floor doors of the vestibule on the same side of the train as Abilene station were open. The vestibule was light and the deceased could, if he looked, have seen that the vestibule was open. The witness looked in another direction, perhaps for a drink of water, for only a short time, and when he again looked into the vestibule the deceased was gone. Soon after the train had passed the deceased was found, his legs, lying across the north rail of the track, cut off and he was otherwise mangled. He died in a few hours. This is all the evidence shows as to the cause of the accident. It is not shown who opened the vestibule, nor is it shown whether the deceased was walking in his sleep or whether he was awake and alert—whether he walked off the train or whether he fell off. All is conjecture.

The burden of showing negligence is generally upon the plaintiff who asserts it as his ground of recovery, but where there are no witnesses to a death which occurs to a passenger of a common carrier for hire and circumstances are proven sufficient to justify the conclusion that the cause of the death was wrongful the jury may infer ordinary care and caution on the part of the injured person from the love of life and the instinct of self-preservation. Is there then, enough evidence in this case to justify the inference that the death was caused or contributed to by any wrongful act on the part of the trainmen? All that they did—all the movements of the train—were susceptible of proof. It is the movements and cause of the movements of the deceased which are conjectural. The only witness whose knowledge of the circumstances is at all intimately connected with the accident is sheriff Baker, who stood upon the floor of the car with only a door between him and the floor of the vestibule where the deceased stood, and, as his attention was almost immediately called to the disappearance of the deceased, he could not have failed to remember any sudden lurching, sudden stopping, or starting of

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the car which would have accounted for the, to him, mysterious disappearance of the deceased. An illegally high rate of speed is one of the grounds upon which negligence is imputed to the railroad company and there is evidence that the train, at the time of the accident, was moving at 12 to 15 miles per hour while the ordinance of the city prohibited a greater speed than 10 miles per hour within the city limits. There is no evidence, however, that this was a contributing cause of the accident. Inferentially the evidence of Baker is to the contrary.

The plaintiff produced all the evidence relating to negligence that was produced and there is no conflict as to any fact. Where there is a conflict of evidence, and the facts are in dispute; negligence is a question of fact for the jury under proper instructions; but where the facts are undisputed and only one inference is to be drawn from them negligence is a question of law for the courts. *Dewald v. K. C., Ft. S. & G. R. Co.*, 44 Kan. 586, 24 Pac. 1101. Since, then, no fault is shown in the running or management of the train which is shown to have caused or contributed to the accident, there remains only to consider whether or not the opening of the vestibule or leaving it open constitutes negligence on the part of the trainmen. In the absence of evidence as to when and by whom the vestibule was opened, we assume that it was opened by one of the trainmen whose duty it was to open it at the proper time to enable passengers to enter or leave the train at the station. Whether it was open for a considerable length of time before the witness, Baker, saw it after he had been aroused from sleep by the station call, had put on his overcoat and gone to the rear end door of the smoker, is immaterial in this case. It had neither caused nor contributed to any injury prior to that time. We will then assume that it had been opened just prior to the time Mr. Baker saw it open, and after the brakeman, by calling the station, had notified the passengers, desiring to leave the train at Abilene, to be prepared to do so. As a question of law, does it endanger the safety of the passengers, desiring to leave the train at Abilene, to be prepared at such time? On the other hand is it not the only orderly and proper way to conduct the business for the safety and convenience of the passengers? It is in evidence in this case and is a matter of general knowledge that, on fast trains especially, when they hear their station called, passengers, who "don't forget their packages," get their belongings and go into the vestibule prepared to alight immediately upon the stopping of the train. It is also generally known that incoming passengers are detained until the outgoing have alighted. If the vestibule must be kept closed until the train comes to a full stop it would often be difficult to open it at all. It would delay trains and discommode passengers. Passengers at such time enter a vestibule expecting to see the exit open and, if they find it closed, immediately seek another.

That a passenger may fall from an exit opened for his accommodation, as possibly the deceased did in this case, is no argu-

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ment against the timely opening. There is danger in every step of life from the first toddling effort of the infant to the last of the octogenarian; danger in standing, danger in sitting, danger in lying, danger in eating, danger in fasting, danger in sleeping, danger in waking. There is no moment of life, active or inactive, on land or on sea when danger is not near. It is omnipresent. When we consider how easily we fall, what trifling incidents, what invisible microbes, end our lives, it is a wonder we ever take the first step; it is a miracle that we attain three score and ten years, not to mention 100. Since danger can in no way and nowhere be absolutely avoided it would be unreasonable to impose upon a common carrier the discontinuance of a practice or mulct it in damages for the doing of an act which accommodates and, by saving them time, lengthens the lives of thousands because in one instance it may have contributed to the shortening of the life of one. It is necessary to the efficient and orderly conduct of the business of carrying passengers in vestibuled railway coaches and necessary for the convenience and accommodation of the passengers that the vestibules be opened before the stopping of trains at stations and, as the practice does not expose the passengers to any considerable danger, the opening of a vestibule at any time after the usual call for a station is not, under ordinary circumstances, and was not in this case, *per se* negligence.

The judgment of the district court is reversed, and the case is remanded. All the Justices concurring.

SOUTHERN RY. CO v. GRIZZLE. O'NEAL v. SAME.

(Supreme Court of Georgia, Jan. 13, 1906.)

[53 S. E. Rep. 244.]

Railroads—Accident at Crossing—Liability of Engineer.*—The act of a railroad engineer in running a train over a public road crossing, in violation of the requirements of the blowpost law, is not a mere nonfeasance of the agent, but is a misfeasance, which renders him individually liable to persons injured as a result of such conduct.

Same—Joint Liability—Engineer and Railroad Company.†—A railway company and its engineer may be jointly sued for a negligent homicide, where the negligence of the company results solely from the act and conduct of the engineer.

Venue—Action for Personal Injuries—County of Accident.—A foreign railroad company operating in this state and an engineer in its employment may be jointly sued in the county in which the cause of action originated, even though the residence of the engineer be in another county in this state.

Removal of Causes—Separable Controversy.—The petition, when considered in its entirety, sought a recovery solely upon the ground that the engineer had failed to comply with the requirements of the

*See note at end of case.

†See foot-notes appended to *Illinois Cent. R. Co. v. Houchins* (Ky.), 18 R. R. R. 850, 41 Am. & Eng. R. Cas., N. S., 850.

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blowpost law. The averments in reference to the location of the warehouses near the crossing were made as a matter of inducement, and not as a ground of recovery, and these allegations did not make a separable controversy between the railway company and the plaintiff. As the engineer was a resident of the state of Georgia, the refusal of the judge to pass an order removing the case to the Circuit Court of the United States was not erroneous.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by America H. Grizzle against T. A. O'Neal and the Southern Railway Company. From an order overruling a demurrer to the complaint, O'Neal brings error. From an order refusing to remove the case to the Circuit Court of the United States, the railway company brings error. Affirmed.

Mrs. America H. Grizzle filed her petition to the superior court of Gwinnett County, alleging in substance that the Southern Railway Company is a corporation operating a line of railway in and through the county of Gwinnett, having an agent and agency therein, and is doing business in said county; that T. A. O'Neal is a resident of Fulton county; that petitioner's husband, Henry M. Grizzle, was killed by the negligence of the railway company and of O'Neal, who was the engineer in charge of the train, while the train was being operated over a public road crossing in the corporate limits of Norcross, in the county of Gwinnett; and damages for the homicide were laid at \$30,000. It was alleged that at this crossing the railway company had three tracks, and the road upon which the plaintiff's husband was traveling passed over all of these tracks; that the intersection of the road and the tracks was on the east side of the public road and of the railroad; that two warehouses, within two feet of the tracks, obstructed the view and sound of approaching trains; and that the train in question came from behind the two warehouses without any warning of its approach, running at a speed of 50 or 60 miles an hour, striking the husband of petitioner and instantly killing him. It is alleged that no bell was rung nor whistle sounded, nor the speed of the train checked, and that the requirements of the blowpost law were entirely disregarded by the engineer. It is also alleged that O'Neal had been in the employ of the company for a long time, and that the alleged negligence of the company was the act of O'Neal, which is alleged to be the joint negligence of both defendants. Process is prayed against the railway company and O'Neal. To this petition O'Neal filed a demurrer, on the grounds that there was no cause of action set forth; that the suit was improperly brought in Gwinnett county, as it should have been brought in the county of Fulton, which is the county of his residence; that no acts of negligence were charged to him except such as were charged to have been done by him as the servant of the railway company, and for that reason he could not be sued jointly with the railway company; that the suit was based on the statutory

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right to recover against the railway company, and there is no common-law or statutory right authorizing him to be joined as a codefendant. This demurrer was overruled, and O'Neal excepted.

The railway company filed a petition asking that the case be removed to the Circuit Court of the United States for the Northern District of Georgia. This petition alleged that the declaration did not charge O'Neal with any actionable wrong; that he was merely a nominal party, joined for the purpose of preventing a removal of the case; that the declaration makes a case involving separable controversies between the plaintiff and the railway company, citizens of different states, in that there is a distinct charge of negligence against the railway alone sufficient to give rise to a cause of action; that the plaintiff was a resident and citizen of the state of Georgia; and that the railway company was a corporation under the laws of Virginia, and a resident and citizen of that state, and a nonresident of the state of Georgia. The court refused to pass an order removing the case to the Circuit Court of the United States, and to this ruling the railway company excepted.

Ino. J. Strickland and J. J. Winn, for plaintiffs in error.

Atkinson & Born, for defendant in error.

COBB, P. J. 1. An agent is not ordinarily liable to third persons for mere nonfeasance. *Kimbrough v. Boswell*, 119 Ga. 201, 45 S. E. 977. An agent is, however, liable to third persons for misfeasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care and diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. See 2 Clark & Skyles on Agency, 1297 et seq.

Misfeasance may involve also to some extent the idea of not doing, as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution, or does not exercise that care, which a due regard to the rights of others

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requires. All this is not doing, but it is not the not doing of **that** which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. Mechem on Agency, § 572. As was said by Grav. C. J., in *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 439: "If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly." In that case the agent was held liable by the fall of a tackle block and chains from an iron rail suspended from the ceiling of a room, which fell, for the reason that the agent had suffered them to remain in such a manner and so unprotected that they fell upon and injured the plaintiff. In *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 742, Metcalf, J., said: "Assuming that he was a mere agent, yet the injury for which this action was brought was not caused by his nonfeasance, but by his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do. The defendant's omission to examine the state of the pipes * * * before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff."

In the present case the failure of the engineer to comply with the requirements of the blowpost law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway. The engineer having once undertaken in behalf of the principal to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance. This view is strengthened by the fact that the blowpost law renders the engineer indictable for failure to comply with its provisions. The allegations of the petition were therefore sufficient to charge O'Neal with a positive tort, for which the plaintiff would be entitled to bring her action against him.

2. The engineer may be sued, and the railway company is also liable to suit, on account of his conduct. Can the engineer and the railway company be jointly sued, when the sole ground of the liability of the railway company is the act of the engineer him-

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self? While the case of *Central Railway Company v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250, is not identical with this case in its facts, it is controlling in principle. In that case the railway company and a passenger were sued jointly for an assault upon another passenger, in which the conductor took part. The liability of the railway company resulted solely from the act of the conductor. It was held that the railway company and the passenger who participated with the conductor in the assault could be jointly sued. It is unnecessary to add anything to the reasoning in that case. It is conclusive upon the question now before us.

3. Suits against railroad companies for cause of action originated, if the company causes of action originating in this state must be brought in the county where he has an agent in that county. If the foreign corporation is operating under a domestic franchise, and there is no agent in the county where the cause of action originated, suit may be brought in the county of the residence of the company owning the franchise. But if it is not operating under a domestic franchise, it has no residence in this state, within the meaning of Civ. Code 1895, § 2334. If an action against such a company is instituted in this state, it must be brought in the county where the cause of action originated, without reference to whether there is an agent in that county or not. *Hazlehurst v. Seaboard Air Line Ry.*, 118 Ga. 858, 45 S. E. 703; *Coakley v. Southern Ry. Co.*, 120 Ga. 960, 48 S. E. 372. The petition alleges distinctly that the cause of action arose in the county of Gwinnett, and that the company has an agent in that county. A suit against the company alone would therefore have to be brought in that county. A suit against O'Neal alone would have to be brought in the county of Fulton. The Constitution declares that suits against joint trespassers residing in different counties may be tried in either county. Civ. Code 1895, § 5872. Here we have a joint liability. O'Neal resides in Fulton county. The question is whether the Southern Railway Company has such a residence in Gwinnett county that a joint suit may be maintained in that county against it and O'Neal, who is a non-resident of the county.

The determination of this question depends upon whether, under the laws of this state, the Southern Railway Company is a resident of Gwinnett county within the meaning of the constitutional provision above referred to. "The Constitution, in fixing the venue of suits against joint defendants, was intended to be exhaustive, and not to leave a hiatus in which the right to bring a single suit against joint defendants might be lost because of the want of jurisdiction to apply the remedy." *Cox v. Strickland*, 120 Ga. 104, 47 S. E. 912. If the Southern Railway Company does not reside in Gwinnett county, within the meaning of this section of the Constitution, then the railway company and O'Neal cannot be jointly sued in that county. Neither can they be jointly sued in Fulton county, for the jurisdiction depends not

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only upon the residence of the defendants in the county where suit is brought, but also upon the residence of the other defendant in another county in this state; the Constitution declaring that, "joint trespassers residing in different counties" may be sued in either county. The Southern Railway Company is engaged in doing business in this state, and has agents located here for that purpose, and it is, so far as the right to sue is concerned, a resident of the state. *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674. It has a residence in Gwinnett county, so far as the right to bring a suit against it for a cause of action originating in that county is concerned. Within the true intent and spirit of the constitutional provision, it therefore resides in Gwinnett county. So residing, it may be sued there alone on a cause of action originating in that county, or it may be there sued jointly with other wrongdoers, who are also residents of this state in other counties.

4. O'Neal being a resident of this state, the right to remove the case to the Circuit Court of the United States depends upon whether there is a separable controversy between the railway company and the plaintiff. It is claimed that there is. It is said that the railway company had located two warehouses within two feet of the tracks, and that the warehouses obstructed the sound of approaching trains, and likewise the view, and that this was an act of negligence on the part of the railway company, in which O'Neal did not at all participate, and this act of negligence made a separable controversy between the plaintiff and the railway company, independent of O'Neal's act in failing to comply with the blowpost law. We cannot concur in this view. We do not think that the petition, properly construed, alleges that the manner in which the warehouses were constructed and located was an act of negligence on the part of the railway company. It is nowhere in the declaration distinctly alleged as an act of negligence. It is in that part which deals with the question of the exercise of proper care and diligence on the part of the plaintiff's husband, and gives a reason why he was not negligent in approaching the crossing. The location of the warehouses, and the effect of the warehouses in obstructing the sound and view of an approaching train, were alleged merely by way of inducement, and not as a ground of recovery. Construing the petition as a whole, the plaintiff seeks to recover alone upon the negligence of the railway company and engineer on account of the failure to comply with the requirements of the blowpost law.

Since this case was argued, the Supreme Court of the United States, on January 2, 1906, in the case of *Alabama Great Southern Ry. Co. v. Thompson*, 26 Sup. Ct. 161, 50 L. Ed. —, rendered a decision on the right of removal in a case similar in many respects to the one now under consideration. We have had before us a certified copy of the opinion which was prepared by Mr. Justice Day. While the court seems to have left open the

Note

question as to whether it would hold that a suit against a railway company and an engineer upon facts similar to those in the present case was properly brought as a joint cause of action, still it was distinctly held that, in determining the question of removal to the Circuit Court of the United States, the cause of action must be deemed joint if the pleader in the state court has made it joint; and that there would then be no separable controversy between the railway company and the plaintiff which would authorize a removal of the case to the federal court. The petition in the present case clearly sets forth a joint cause of action. We have reached the conclusion that under the facts alleged there was a joint cause of action. It is clear, therefore, that the case was not removable, if we have construed the petition properly as to the location of the warehouses. We do not think there was any error in refusing to pass an order of removal.

Judgment affirmed. All the Justices concurring.

NOTE.

PERSONAL LIABILITY OF AGENTS OR SERVANTS TO THIRD PERSONS FOR INJURIES FROM NEGLIGENCE.

- A. Nonfeasance and Misfeasance—Definitions, 458.
- B. General Rules and Principles, 459.
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The decisions on the questions involved in this note are comparatively few. Especially is this so in regard to English cases. In the United States these questions more frequently arise, owing to the fact that in some cases it is contended that a resident employee has been joined as defendant with his master merely for the purpose of defeating the right of the master to remove the case to the Federal court for diversity of citizenship. Not only is there this paucity of authority, but the authorities existing are far from being satisfactory; for, although they generally agree as to the general rules, they are somewhat confusing, and even in some cases directly conflicting in applying them. But we think it will be found from a close examination of the authorities, that it may be stated as a general rule, prevailing, at least, in most of the United States, that an agent or servant is liable to a third person for injuries resulting from his negligence, whether of commission or omission, while undertaking or attempting to perform a service for his principal, if he would be liable had his act or omission occurred when he was under no contract of employment or agency, but was acting merely as an individual member of society.

Inconsistent Decisions.—In *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491, it is said in the opinion: "The attempt by the courts to maintain this indistinguishable distinction has led to many inconsistent decisions. Thus, in *Albro v. Jaquith*, 4 Gray (70 Mass.), 99 (64

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Am. Dec. 56), the plaintiff was not allowed to recover of the superintendent of a canal company for damages caused by negligence in the management of the apparatus used for the purpose of generating, containing and burning inflammable gas, the superintendent being the agent of the company, and being charged with carelessly, negligently, and unskillfully managing the business. It was held that he was not charged with any direct act of misfeasance, but only with nonfeasance, and that there was no redress, because, as the court said, the obligation to be faithful and diligent was founded in an express contract with his principal. As we have before indicated, this would be equally true of the acts of commission or misfeasance in his stewardship. But in *Bell v. Josselyn*, 3 Gray (69 Mass.), 309 (63 Am. Dec. 741), also a Massachusetts case, and decided the same year, it was held that an agent who negligently directed water to be admitted to a water pipe was liable to a third person, because such action was misfeasance.

In that case it was not claimed that the admission of water to the pipe was negligent or wrongful, but the negligent act or omission was in allowing the pipe to become obstructed, certainly as pure an omission or nonfeasance as could be conceived of."

Wharton on Negligence—Distinction between Nonfeasance and Misfeasance Not Maintainable.—In Wharton on Negligence, sec. 535, the author insists that the distinction, in this class of cases, between nonfeasance and misfeasance, can no longer be sustained, that "the true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence, the reason being, that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties, but that wherever there is not such interruption of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury."

Civil Law—Delaney v. Rochereau Criticised.—In *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491 it is said in the opinion: "But the honorable judge who wrote the opinion in *Delaney v. Rochereau & Co.* (34 La. Ann. 1123), supra, was mistaken in his announcement that the civil law indorsed the distinction upon which his decision was based, for, while the doctrine is stated in the Justinian Code that no man could usually be made liable for a mere omission to act, it was otherwise when the omission to act involved a neglect of duty. Domat argues that, as an agent is at liberty not to accept the order and power which are given him, so he is bound, if he does accept the order, to execute it, and, if he fail to do so, he will be liable for the damages which he shall have occasioned by his not acting."

Abstract Rule Nullified.—In *Henshaw v. Noble*, 7 Ohio St. 226, it is said in the opinion: "It was admitted to be true abstractly, that an action on the case for negligence cannot be maintained by a third party against an agent, where the negligence consists in the omission of a duty imposed. But this was qualified by adding that where there was negligence in the doing of an act, and injury to another, an action could be sustained against the agent. Now, if negligence be the want of proper care and diligence, the qualification would seem to nullify the abstract rule."

A. NONFEASANCE AND MISFEASANCE—DEFINITIONS.

In *Van Antwerp v. Linton*, 89 Hun (N. Y. Sup. Ct.), 417, it is said in the opinion: "The distinction between nonfeasance and mis-

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feasance has been expressed by the courts of this State as follows: 'If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one the law imposed upon him independently of his agency or employment, then he is liable.'"

In *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, it is said in the opinion: "But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts, and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly."

Misfeasance Preceded by Nonfeasance.—In *Bell v. Josselyn*, 3 Gray (69 Mass.), 309, 63 Am. Dec. 741, where an agent had been charged with negligence in admitting water into the pipes in a building without seeing that they were in a proper condition, Judge Metcalf, in delivering the opinion of the court, said: "Nonfeasance is the omission of an act which a person ought to do, misfeasance is the improper doing of an act which a person might lawfully do, and malfeasance is the doing of an act which a person ought not to do at all. The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act to be done a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a nonfeasance."

Mechem on Agency.—In *Mechem on Agency*, § 572, the author says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty, which he owed to his principal and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent the idea of not doing, as where the agent while engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances, does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the not doing which constitutes actionable negligence in any relation."

B. GENERAL RULES AND PRINCIPLES.

1. Nonfeasance.

The authorities are unanimous in declaring it to be a general rule that an agent or servant cannot be held responsible to a third party for nonfeasance, the mere omission to undertake to perform a duty which he owed to his principal or master under his contract of employment.

England.—*Lane v. Colton* (Eng.), 12 Mod. 488.

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United States.—*Burch v. Caden Stone Co.*, 93 Fed. Rep. 181; *Kelly v. Chicago & A. Ry. Co.* (C. C.), 122 Fed. Rep. 286; *Moore v. Lawrence* (C. C.), 16 Fed. Rep. 87.

Georgia.—*Kimbrough v. Boswell*, 119 Ga. 201, 45 S. E. 977; *Reid v. Humber*, 49 Ga. 207.

Indiana.—*Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829.

Louisiana.—*Delaney v. Rochereau & Co.*, 34 La. Ann. 1123.

New Hampshire.—*Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735.

New York.—*Burns v. Pethcal*, 75 Hun (N. Y. Sup. Ct.), 437, 27 N. Y. Supp. 499; *Colvin v. Holbrook*, 2 N. Y. 126; *Crane v. Onderdonk*, 67 Barb. (N. Y.), 47; *Denny v. Manhattan Co.*, 2 Denio (N. Y.), 115, 5 Denio, 639; *Hall v. Lauderdale*, 46 N. Y. 70; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Van Antwerp v. Linton*, 89 Hun (N. Y. Sup. Ct.), 417, affirmed in 157 N. Y. 716.

Pennsylvania.—*Jessup v. Sloneker*, 142 Pa. St. 527, 21 Atl. 988.

Tennessee.—*Erwin v. Davenport*, 56 Tenn. 45; *Drake v. Hagan*, 108 Tenn. 265, 67 S. W. 470.

Texas.—*Labadie v. Hawley*, 61 Tex. 177, 48 Am. Dec. 278.

In *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829, it is said in the opinion: "That when an agent owes a duty and one to whom the duty is owing is injured by reason of the failure to perform such duty, the agent is liable, does not admit of question, for he is liable for the result of his neglect to perform any duty devolving upon him in his individual character. Not so, however, when he is simply the agent of the principal to perform the duty owing from the principal to others."

In *Burns v. Pethcal*, 75 Hun (N. Y. Sup. Ct.), 437, 27 N. Y. Supp. 499, it is said in the opinion: "The English authorities upon the question of the liability to third persons of a servant or agent for an act or omission performed or omitted by him, while engaged in the business of his master, are to the effect that the servant is liable for misfeasance, though the act be in obedience to the masters' order, but that for nonfeasance or omission of duty, he is not liable to third persons, but only to the master, who alone is answerable to third persons for the servants neglect."

We think it may be safely said that the English rule prevails generally in this and other States, notwithstanding the broad declarations of some judges and text writers to the effect that a servant is liable to third persons, injured by his negligence, either alone or jointly with his master."

In *Delaney v. Rochereau & Co.*, 34 La. Ann. 1123, it is said in the opinion: "At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for doing something which he ought to have done, the agent in the latter case being liable to his principal only. For nonfeasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amendable for his conduct. An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations towards third persons, other than those to his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible."

Blackstone.—In Blackstone's Commentaries, vol. 1, p. 431, the author says: "If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage

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must be done while he is actually employed in the master's service, otherwise the servant shall answer for his own misbehavior. Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master, because this negligence happened in his service, otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house, for there he is not in his master's immediate service, and must himself answer the damage personally."

Mechem on Agency.—In Mechem on Agency, § 539, the author says: "The agent's primary duty is to his principal: To him alone does he stand in the relation of privity and confidence. To him alone does he owe the performance of those duties which are implied from that relation, or which he has expressly assumed, and to him alone is the agent responsible for a failure to perform them. It is therefore the general rule that no action can be maintained by third persons against the agent to recover damages for any injury which they may have sustained by reason of the nonperformance or neglect of a duty which the agent owes to his principal."

Story on Agency.—In Story on Agency, § 309, the author says: "The distinction thus propounded between misfeasance and nonfeasance, between acts of direct, positive wrong and mere neglects of agents, as to their personal liability therefor, may seem nice and artificial, and partake perhaps not a little of the subtlety and overrefinement of the old doctrines of the common law. It seems however to be founded upon this ground, that no authority whatever from a superior can furnish to any party a just defense for his own positive torts or trespasses, for no man can authorize another to do a positive wrong. But in respect to nonfeasances, or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between parties standing in privity of law or contract with each other, and no man is bound to answer for any such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct. Whether the distinction be satisfactory or not, it is well established, although some niceties and difficulties occasionally occur in its practical application to particular cases."

2. Misfeasance.

According to the majority doctrine, an agent or servant is liable for an injury to a third party which resulted from his misfeasance, the improper doing of an act for the principal which the contract of employment lawfully required the agent or servant to perform. And such misfeasance may consist of negligence of commission, or in failure to exercise reasonable care for the safety of the persons or property of third parties in the performance of a duty to his principal or master.

United States.—*Kelly v. Chicago & A. Ry. Co.* (C. C.), 122 Fed. Rep. 286.

Alabama.—*Cox, Brainard & Co. v. Keahey*, 36 Ala. 340, 76 Am. Dec. 325; *Mayer v. Thompson-Hutchison Building Co.*, 104 Ala. 611, 16 So. 620.

Arkansas.—*Stiewel v. Borman*, 63 Ark. 30, 37 S. W. 404.

California.—*Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. 708; *Brownell v. Fisher*, 71 Cal. 150.

Colorado.—*Miller v. Staples*, 3 Colo. App. 93, 32 Pac. 81.

Connecticut.—*Bailey v. Bussing*, 37 Conn. 349; *Bennett v. Ives*, 30 Conn. 329.

Georgia.—*Kimbrough v. Boswell*, 119 Ga. 201, 45 S. E. 977.

Illinois.—*Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384; *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 890; *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416.

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Indiana.—Berhoff *v.* McDonald, 87 Ind. 549; Blue *v.* Briggs, 12 Ind. App. 105, 39 N. E. 885; Wright *v.* Compton, 53 Ind. 337; McNaughton *v.* Elkhart, 85 Ind. 384.

Kentucky.—Illinois Cent. R. Co. *v.* Coley (Ky.), 89 S. W. 234; Illinois Cent. R. Co. *v.* Houchins (Ky.), 18 R. R. R. 850, 41 Am. & Eng. R. Cas., N. S., 850, 89 S. W. 530; Martin *v.* Louisville & N. R. Co., 95 Ky. 612, 26 S. W. 801; Campbell *v.* Hillman, 15 B. Mon. (Ky.), 508.

Maine.—Campbell *v.* Portland Sugar Co., 62 Me. 552; Richardson *v.* Kimball, 28 Me. 463.

Massachusetts.—Bell *v.* Josselyn, 69 Mass. (3 Gray) 309, 63 Am. Dec. 741; Bickford *v.* Richards, 154 Mass. 163, 27 N. E. 1014; Haws-worth *v.* Thompson, 98 Mass. 77; Hewett *v.* Swift, 3 Allen (Mass.), 420; Nowell *v.* Wright, 85 Mass. (3 Allen) 166, 80 Am. Dec. 62; Toomey *v.* Donovan, 158 Mass. 232, 33 N. E. 396.

Michigan.—Chapel *v.* Smith, 80 Mich. 100, 45 N. W. 69; Ellis *v.* McNaughton, 76 Mich. 237, 42 N. W. 1113; Weber *v.* Weber, 47 Mich. 569, 11 N. W. 389; Starkweather *v.* Benjamin, 32 Mich. 306.

Missouri.—Harriman *v.* Stowe, 57 Mo. 93; Lottman *v.* Barnett, 62 Mo. 159; Martin *v.* Benoist, 20 Mo. App. 262; Buis *v.* Cook, 60 Mo. 391.

New Hampshire.—Hill *v.* Caverly, 7 N. H. 215, 26 Am. Dec. 735.

New Jersey.—Horner *v.* Lawrence, 37 N. J. L. 46; Van Winkle *v.* American Steam Boiler Co., 52 N. J. L. 240, 19 Atl. 472; Janse *v.* Sutton, 43 N. J. L. 257.

New York.—Crane *v.* Onderdonk, 67 Barb. (N. Y.), 47; Suydam *v.* Moore, 8 Barb. (N. Y.), 358; Van Antwerp *v.* Linton, 89 Hun (N. Y.) 417, affirmed in 157 N. Y. 716.

North Carolina.—Hussey *v.* Norfolk S. R. Co., 98 N. Car. 34, 3 S. E. 923.

Pennsylvania.—Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 33 Atl. 237; New York, etc., Telegraph Co. *v.* Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338; Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

Tennessee.—Drake *v.* Hagan, 108 Tenn. 265, 67 S. W. 470; Erwin *v.* Davenport, 56 Tenn. 45.

Texas.—Kenney *v.* Lane, 9 Tex. Civ. App. 150, 36 S. W. 1063; Labadie *v.* Hawley, 61 Tex. 177, 48 Am. Dec. 278; Baker *v.* Wasson, 53 Tex. 150.

Washington.—Morrison *v.* Northern Pac. Ry. Co. (Wash.), 10 R. R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233, 74 Pac. 1064.

Wisconsin.—Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93.

In Lane *v.* Colton, 12 Mod. R. (Eng.), 488, Lord Holt lays it down as a general rule: That "a servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it, but for a misfeasance, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrongdoer."

In Philips *v.* Wait, 30 N. Y. 78, it is held that principal and agent may be jointly sued for the negligence of the latter, in the course of his employment, resulting in a personal injury to the plaintiff.

In Richardson *v.* Kimball, 28 Me. 463, it is held that an agent is liable for misfeasances to the owner of property injured thereby, whether he acted by the direction of his principal or not.

The relation of agency does not exempt one from liability for any injury to third parties resulting from his neglect of duty, either through misfeasance or nonfeasance, for which he would otherwise be liable, and the agent can not excuse himself on the plea that his principal is liable for the injury. So held in Mayer *v.* Thompson-Hutchison Building Co., 104 Ala. 611, 16 So. 620.

In Osborne *v.* Morgan, 130 Mass. 102, 39 Am. Rep. 437, it is said in the opinion: "The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured

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thereby" (citing *Hawsworth v. Thompson*, 98 Mass. 77; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *May v. Western Union Telegraph Co.*, 112 Mass. 90; *Grimwell v. Western Union Telegraph*, 113 Mass. 299; *Ames v. Union Railway*, 117 Mass. 541, 19 Am. Rep. 426; *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Rapson v. Cubitt*, 9 M. & W. 710; *George v. Skivington*, L. R. 5 Ex. 1; *Parry v. Smith*, 4 C. P. D. 325; *Foulkes v. Metropolitan Railway*, 4 C. P. D. 267, and 5 C. P. D. 157).

An agent having complete control and management of his principal's business, with power to do what is reasonably necessary to protect third persons against injuries from omissions or commissions in the conduct of the same, is under obligation to so use that which he controls as not to injure another, and will be liable in damages to any third person for a failure to discharge such duty. So held in *Stiewel v. Borman*, 63 Ark. 30, 37 S. W. 404.

Mechem on Agency.—In *Mechem on Agency*, § 340, the author says: "An agent, however, like every other person, is bound in the course of the discharge of his duty to his principal, to exercise a due regard for the rights and privileges of others. If he fails in this duty and by his willful act or by his negligent conduct inflicts an injury upon a third person, he is liable to that third person in the same manner as though he were not an agent. This obligation is not one which grows out of his relation as an agent but one which the law imposes upon every responsible member of society."

Clark & Skyles on Agency.—In *Clark & Skyles on Agency*, § 595, the law is thus stated: "But where an agent is guilty of misfeasance, that is, where he has actually entered upon the performance of his duties to his principal, and in doing so, fails to respect the rights of others, by doing some wrong, whether it is a wrong of omission or a wrong of commission, as where he fails to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but on the ground that is a wrongdoer, and as such, is responsible for any injury he may cause."

Shearman and Redfield on Negligence—Illustrations.—In *Shearman & Redfield on Negligence* (4th Ed.), 425, the author says: "No man increases or diminishes his obligations to strangers by becoming an agent; but if in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence in the performance of duties imposed by law upon him, in common with all other men. Thus, a servant is personally liable to a third person for negligently driving the master's horse or carriage over him, even though the master also be liable. So the driver of a railroad engine, or the conductor of a train, is personally responsible for the cattle killed on the track through his negligence, or for bodily injuries suffered by a passenger from the same cause, and a servant in a stone quarry, adjacent to highway, negligently setting off a blast, is liable to a traveler injured thereby."

No Hardship in Requiring Servant to Respond Directly to Injured Party.—In *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491, it is said in the opinion: "Of course, if the omission of the act or the nonfeasance (by an agent or servant) does not involve a non-performance of duty, then the responsibility would not attach. If it does involve a nonperformance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages."

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3. Liability of Negligent Servant for Injuries to His Fellow Servant.

And under this rule a servant may be liable to his fellow servant.

Scotland.—*Wright v. Roxburgh* (Scot.), 2 Ct. of Sess. Cas. (3d series), 745.

Indiana.—*Hinds v. Overacker*, 66 Ind. 547, 32 Am. Rep. 114; *Hinds v. Harbu*, 58 Ind. 121; *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. 937; *Rogers v. Overton*, 87 Ind. 410; *Wright v. Compton*, 53 Ind. 337.

Maine.—*Hare v. McIntyre*, 82 Me. 240, 19 Atl. 453; *Atkins v. Field*, 89 Me. 281, 36 Atl. 375.

Massachusetts.—*Hawkesworth v. Thompson*, 98 Mass. 77; *Moore v. Fitchburg R. Corp.*, 70 Mass. (4 Gray) 465, 64 Am. Dec. 83; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

Minnesota.—*Griffiths v. Wolfram*, 22 Minn. 185.

Missouri.—*Steinhauser v. Sprawl*, 114 Mo. 551, 21 S. W. 515.

Washington.—*Morrison v. Northern Pac. Ry. Co.* (Wash.), 10 R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233, 74 Pac. 1064.

Wisconsin.—*Greenburg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93; *Lawton v. Waite*, 103 Wis. 244, 79 N. W. 321.

In *Atkins v. Field*, 89 Me. 281, 36 Atl. 375, it is held that a servant is liable to a fellow servant for injuries caused by his negligence in the line of his duty to the common employer.

In *Sheaman & Redfield on Negligence* (4th Ed.), 425, the author says: "The authorities are now unanimously in favor of holding a servant liable to his fellow servants for injuries suffered by them through his personal negligence."

Review of English Decisions.—In *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, it is said in the opinion: "So far as we are informed, there is nothing in any other reported case, in England, or in this country, which countenances the defendant's position, except in *Southcote v. Stanley*, 1 H. & N. 247; S. C., 25 L. J. (N. S.). Ex. 339, decided in the court of Exchequer in 1856, in which the action was against the master; and chief Baron Pollock and Barons Alderson and Bramwell delivered severally oral opinions at the close of the argument. According to one report, chief Baron Pollock uttered this dictum: 'Neither can one servant maintain an action against another for negligence while engaged in their common employment.' 1 H. & N. 250. But the other report contains no such dictum, and represents Baron Alderson as remarking that he was 'not prepared to say that the person actually causing the negligence,' (evidently meaning 'causing the injury,' or 'guilty of the negligence') 'whether the master or servant, would not be liable.' 25 L. J. (N. S.), Ex. 340. The responsibility of one servant for an injury caused by his own negligence to a fellow servant was admitted in two considerable judgments of the same court, the one delivered by Baron Alderson four months before the decision in *Southcote v. Stanley*, and the other by Baron Bramwell eight months afterwards, *Wiggett v. Fox*, 11 Exch. 832, 839; *Degg v. Midland Railway*, 1 H. & N. 772, 781. It has since been clearly asserted by Barons Pollock and Hudleston. *Swainson v. Northeastern Railway*, 3 Ex. D. 341, 343. And it has been affirmed by direct adjudication in Scotland, in Indiana, and in Minnesota. *Wright v. Roxburgh*, 2 Ct. of Sess. Cas. (3d series) 748; *Hinds v. Harbu*, 58 Ind. 121; *Hinds v. Overacker*, 66 Ind. 547, 32 Am. Rep. 114; *Griffiths v. Wolfram*, 22 Minn. 185."

Effect of Master's Approval of Negligent Conduct.—The fact that the common employer approves the conduct of an employee, without directing it, does not free the latter from personal liability to a fellow servant injured by reason of such conduct, if it was in fact negligent. So held in *Atkins v. Field*, 89 Me. 281, 36 Atl. 375.

Same—Means and Mode of Setting Up Apparatus Selected by Servant.—Where a servant personally selects the means and directs the mode of setting up apparatus furnished by the common employer, he becomes personally liable to his fellow servants for

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injuries caused by his negligence in so doing. And the fact that the work was satisfactory to the common employer, does not exempt the employee from liability to his fellow servants for such negligence. So held in *Atkins v. Field*, 89 Me. 281, 36 Atl. 375.

Assumption of Risk from Fellow Servant's Negligence.—In *Lawton v. Waite*, 103 Wis. 244, 79 N. W. 321, it is said in the opinion: "When it is said that an employee assumes the risk from the negligence of his co-employee, it means only that he assumes it *quo ad* his employer, but not as against his co-employee. If one by his negligence injures another, it is no defense, in a suit against him, to assert that they are both employed under one master," * * *.

Negligence in Running Train—Liability of Engineer for Death of Fellow Servant.—In *Swainson v. North E. Ry. Co.*, 3 Exch. D. (Eng.), 341, where the railroad was sued for the death of one of its employees killed by the negligence of one of the defendant's engine drivers, Barons Pollock and Huddleston, while they exempt the company because of the fellow-servant rule, said: "It is clear that an action would well lie against the driver of the engine, by whose negligent act the death was occasioned."

Direction of Use of Unsafe Ladder—Liability of Master's Wife for Injury to Her Fellow Servant.—In *Steinhauser v. Spraul*, 114 Mo. 551, 21 S. W. 515, it is held that an action may be maintained by a servant against his master's wife, as his fellow servant, for injuries resulting from using at her direction a ladder known by her to be unsafe.

Contra.—But in *Albro v. Jaquith*, 70 Mass. 4 Gray 99, 64 Am. Dec. 56, it is held that one servant is not liable to an action by another in the employment of the same master for damages occasioned by the negligence of the first in such employment. This decision, however, was overruled in *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437.

C. APPLICATION OF RULES—WHETHER NONFEASANCE OR MISFEASANCE.

1. Agent or Servant Held Not Liable.

Failure to Apply Principal's Money to Payment of His Debt.—An agent having money of his principal in his hands, which is applicable to the payment of a debt, is not liable to the creditor on account of his refusal to pay it. So held in *Hall v. Lauderdale*, 46 N. Y. 70.

Refusal of Agent to Transfer Stock.—In *Denny v. The Manhattan Company*, 2 Denio (N. Y.), 115, 5 Denio 639, it appeared that plaintiffs were the assignees of a certificate of stock, standing in the name of another person, of a foreign banking corporation, which had a transfer office in the state under the charge of an agent authorized to register transfers, who unjustly refused to permit plaintiffs' stock to be transferred to them on its books, and they brought case against the agent. It was held that the action could not be maintained, as an agent is responsible to his principal alone for failure to discharge a duty of his agency.

Failure to Charge Indorsers of Bills—Liability of Bank, as Agent of Correspondent Bank, to Latter's Principal.—In *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459, it is held that where a bank sends to its correspondent bank, for collection, endorsed bills, payable at another place, and the latter bank endorses and transmits them to its own correspondent, at the place of payment, the immediate correspondent of the first bank is alone responsible to the latter, for a neglect to charge the indorsers, the third bank to which the bills were transmitted being only liable to its immediate principal.

Failure to Transmit Order for Sale of Cotton to Principal.—An agent of a factor is not liable to a third person for failing to transmit his orders to his principal for the sale of cotton consigned by the third person to the factor. So held in *Reid v. Humber*, 49 Ga. 207.

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Engineers' Strike—Delay in Transportation of Freight—Liability to Shipper.—In *Blackstock v. New York & Erie R. Co.*, 20 N. Y. 48, it appeared that delay in the transportation of freight was caused by a great number of the railroad's employees suddenly and wrongfully refusing to work; and it is said in the opinion: "Assuming then that their abandoning their work was a breach of contract of the engineers, they by that act became responsible to the defendants (the railroad company) for all its direct consequences. The case is therefore one in which the actual delinquents, through whose fault the injury was sustained, were responsible to the defendants but were not responsible to plaintiff. This shows the equity of the rule, which holds the master or employer answerable in such cases."

Improvement of Stream—Injury to Property of Third Party—Liability of Employees.—Where a corporation were authorized to improve a stream, its servants were not liable to a third party for an injury done by them in doing what the corporation had authority to do; there being no privity by law or contract between such servants and the injured party. So held in *Woodward v. Webb*, 65 Pa. St. 254.

Negligence in Constructing Stand for Spectators—Injury to Spectator—Liability of Constructor.—In *Van Antwerp v. Linton*, 89 Hun (N. Y. Sup. Ct.), 417, affirmed in 157 N. Y. 716, it was held that agents employed by a corporation to erect a stand for use of the spectators of a base ball game were not liable to one of the spectators for personal injuries which resulted for the agent's negligence in constructing the stand, which fell and caused the injuries, as such negligence was mere nonfeasance and not misfeasance.

Fall of Sawmill Platform—Failure to Inspect and Repair—Injury to Employee—Liability of Superintendent.—In *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564, it appeared that the plaintiff, while employed upon a platform in a sawmill belonging to two of the defendants, was injured by reason of its falling, and died from his injuries. His administrator brought in an action against the owners of the mill and their superintendent, who had general charge of the business, and was specially charged with the duty of looking after the necessary repairs, which included the duty of inspecting such platform from time to time, to see that it was kept in a safe condition. Judgment was rendered against all the defendants. In the Court of Appeals, it was held that the omission of such superintendent to perform the duty devolving upon him constituted nonfeasance for which he was not liable to plaintiff.

Escape of Inflamable Gas—Injury to Mill Hand—Negligence and Incompetency of Superintendent.—In *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, it is said in the opinion: "The ruling sustaining the demurrer was based upon the judgment of this court, delivered by Mr. Justice Merrick, in *Albro v. Jaquith*, 4 Gray, 99, in which it is held that a person employed in the mill of a manufacturing corporation, who sustained injuries from the escape of inflammable gas, occasioned by the negligence and unskillfulness of the superintendent of the mill in the management of the apparatus and fixtures used for the purpose of generating, containing, conducting and burning the gas for the lighting of the mill, could not maintain an action against the superintendent. But, upon consideration, we are all of the opinion that judgment is supported by no satisfactory reasons, and must be overruled."

Height of Dam—Injury to Upper Proprietor—Liability of Mill Owner's Agent.—An agent, who merely carries on a mill for the owner's benefit, cannot be held responsible on account of its dam being maintained at too great a height, and causing water to flow back to the injury of another mill owner. So held in *Brown Paper Co. v. Dean*, 123 Mass. 267.

Agent's Malicious Failure to Keep Drain Open—Injury to Land.—In *Feltus v. Swan*, 62 Miss. 415, it is held that an agent is not liable

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to a third party for damage resulting from an omission or neglect of duty in respect to the business of his agency, even though such omission be with a malicious intent to injure the third person, and has that effect. In this case this rule was held applicable where an agent in charge of a plantation maliciously neglected and refused to keep open a drain, which it was his duty, as such agent, to keep open, and thereby injured an adjoining plantation.

Tenant's Negligence in Use of Cooking Range—Injury to Adjoining Proprietor—Liability of Agent on Account of His Refusing to Pay for Removing Range.—In *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Dec. 278, it appeared that an agent, who had rented his principal's house to another, authorized the tenant to construct a cooking range therein, which, from the manner of its use, resulted in injury to an adjoining proprietor. It was held that the fact that the agent refused to compensate the tenant for removing the range when it was complained of, as a nuisance, did not render the agent liable to the adjoining proprietor.

Failure to Repair Balcony—Death of Tenant's Son—Liability of Agent.—In *Delaney v. Rochereau & Co.*, 34 La. Ann. 1123, it appeared that defendants, as agents of the owner of the property, had control of it; that only half of it was rented and occupied, that there was in front of the whole building a balcony which defendants knew needed repairs, that while the tenant was giving an entertainment, his son and a number of guests went upon the balcony, which gave way, and his son was injured, and died from his injuries. It was held that defendants were not liable to the tenant for the death of his son, on the ground of his nonfeasance in failing to repair the balcony.

Failure to Repair—Injury to Tenant.—In *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829, it is held that the failure of an agent to make repairs and otherwise keep the property of his principal in a tenantable condition, is nonfeasance of a duty owing to his principal, and not misfeasance, and does not render the agent liable for personal injury to the tenant of the premises resulting from failure to repair.

Failure to Repair Drain or Warn Tenant—Personal Injuries—Liability of Landlord's Agent.—In *Drake v. Hagan*, 108 Tenn. 265, 67 S. W. 470, the declaration alleged, in substance, that an agent having charge of a house and lot, knew that a certain drain on the premises, covered with planks, was out of repair, and concealed the same from a tenant when she moved in, and failed to notify her of the defect afterwards; and that the tenant fell into the drain in consequence of its defective condition and sustained personal injuries. It was held that this merely charged the agent with nonfeasance, for which he was not liable.

Explosion of Locomotive—Injury to Passenger—Liability of Employee for Failure to Inspect and Repair.—A railroad employee, charged with the duty of inspecting locomotives, cannot be held personally liable to his company's passenger for injuries to the latter from the explosion of an engine, although the accident was the consequence of the employee's failure to inspect and repair the engine. So held in *Kelly v. Chicago & A. Ry. Co.* (C. C.), 122 Fed. Rep. 286.

Construction of Sewer—Cave-in—Failure to Warn Workman—Liability of Foreman.—Where a foreman in charge of the construction of a sewer fails to direct a workman not to work at a dangerous place, and fails to warn him of the danger of working there, he is guilty only of an omission of duty which devolved upon him purely from his employment, and is not liable for injury to such workman caused by a cave-in at such point. So held in *Burns v. Pethcal*, 75 Hun (N. Y. Sup. Ct.), 437, 27 N. Y. Supp. 499.

Injury to Building—Negligent Work—Liability of Sub-Contractors.—In *Bissell v. Roden*, 34 Mo. 63, 84 Am. Dec. 71, it is held that where sub-contractors, who did not contract with the owner of the building,

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but with the person with whom the owner contracted for the work, injured such owner's property by negligently and unskillfully doing the work, they are not liable to the owner, there being no privity of contract between them and the owner. In this case the negligence complained of was in the construction of a water pipe, which broke and flooded the premises.

Failure to Guard Ditch Dug Across Sidewalk—Liability of Laborer for Personal Injuries.—A laborer employed to open a ditch across a borough walk, is not liable for injury to a third party from his failure to guard the ditch, as the duty to guard the ditch is that of the person having it dug, and who has direction and control of the work. So held in *Jessup v. Sloneker*, 142 Pa. St. 527, 21 Atl. 988.

Injury to Stock Impounded by Agent—Failure to Give Proper Care.—Where the agent of the owner of land takes up stock trespassing on the property, and the animals while impounded are in possession and control of the principal, and are damaged by the failure of the principal to give them proper care and attention, the agent is not responsible for the injury so caused. So held in *Kimbrough v. Boswell*, 119 Ga. 201, 45 S. E. 977.

2. Agent or Servant Held Liable.

Injury to Mail Clerk—Liability of Engineer.—Where a railroad engineer is guilty of negligence which results in injury to a mail clerk, the engineer and the railroad company are jointly liable for the injury, and may be sued jointly or severally. *Illinois Cent. R. Co. v. Houchins* (Ky.), 18 R. R. R. 850, 41 Am. & Eng. R. Cas., N. S., 850, 89 S. W. 530. In this case a collision was the result of a mistake of the engineer in reading his time-card.

Collision—Injury to Engineer—Negligence of Other Engineer in Moving His Train from Branch Track without Protection against Regular Train.—In *Schumpert v. Southern Ry. Co.*, 65 S. Car. 332, 43 S. E. 813, the evidence tended to show that the injury complained of was occasioned by a collision between the train on which the defendant employee was engineer and the train on which plaintiff was engineer, resulting from the negligence or misconduct of the defendant engineer in moving his engine and train from a branch line upon the main line, without protection against the regular freight train on which plaintiff was engineer, which at the time of the collision was within its time, and due at any moment, and it is said in the opinion, in substance, that such conduct on the part of the engineer was clearly misfeasance for which he would be personally liable to the injured engineer.

Injury to Brakeman—Liability of Conductor.—An action by a brakeman for personal injuries may be maintained against his employer and the conductor of the train jointly, where the injury was caused by the act of the latter. So held in *Morrison v. Northern Pac. Ry. Co.* (Wash.), 10 R. R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233, 74 Pac. 1064. In this case a collision was the result of the negligence of the conductor in allowing his train to run past a side track, instead of clearing the main track for a train which had the right of way.

Engineer Starting Train without Warning, with Knowledge That Car-Coupler Was between Cars.—Where an engineer starts his train, without giving warning, when chargeable with notice that a switchman is between cars of the train engaged in coupling them, the engineer's act is misfeasance, not nonfeasance. So held in *Warax v. Cincinnati, etc., Ry. Co.* (C. C.), 72 Fed. Rep. 637.

Running Locomotive against Person—Liability of Engineer.—Where an engineer negligently runs his locomotive against a wagon and injures an occupant of it, he is personally liable for the injuries, although he was operating the engine for his master, a railroad company. So held in *Illinois Cent. R. Co. v. Coley* (Ky.), 89 S. W. 234.

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Cars Left Too Near Track by Agent of Gas Company—Collision—Liability of Agent to Railroad Company.—Where a gas company having exclusive control and possession of the side-track of a railroad adjacent to its works, for the receipt and delivery of coal, employs an adjoining proprietor to unload the coal delivered on a train of cars, if the cars, when unloaded, are negligently placed or left by such proprietor's servants so near the main track as to cause a collision with a passing train, he and the gas company are jointly liable to the railroad company for the damages caused by the collision. So held in *Montgomery & E. Ry. Co. v. Chambers & Abercrombie*, 79 Ala. 338.

Sending Wrong Telegraph Message—Liability of Telegraph Company.—A telegraph company, even if considered only as the agent of the sender of a message, is liable to the person to whom it was sent for misfeasance in sending a different message from the one addressed to him. So held in *New York, etc., Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

Mis-Routing Freight—Liability of Carrier Acting as Agent for Another Carrier.—In *Illinois Cent. R. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 890, it is held that billing potatoes in car-load lots via a specified line of steamers from a certain intermediate point is an act of positive misfeasance where the forwarding carrier had in its possession rate-sheets routing such shipments all rail and stating that the steamer line would not accept bulk freight; and such forwarding carrier is liable to the shipper for the result of the delay occasioned by the mistake of its employees, even though it was acting as agent for one of the companies forming the transportation line over which the shipment was routed.

Negligence in Blasting—Injury to Highway Traveler—Liability of Quarry Hand.—Where an employee, while quarrying stone near a public highway, sets off a blast when a highway traveler is passing, and thereby injures him, the servant is personally liable to the injured person. So held in *Wright v. Compton*, 53 Ind. 337.

Trap-Door Left Insecure and Unguarded—Liability of Agent by Whom It Was Constructed.—An agent undertaking to construct a trap-door for his principal is liable for personal injuries to a third person resulting from the negligence of the agent in leaving it insecure and unguarded. So held in *Harriman v. Stowe*, 57 Mo. 93.

Failure to Replace Sidewalk—Injuries to Pedestrian—Liability of Agent Erecting Building.—An agent who has the entire control of the erection of a building for his principal is liable for personal injuries to a third person, resulting from the agent's failure to replace a portion of the sidewalk in front of the lot on which the building was being erected, which had been removed by an employee contrary to his orders, but with his knowledge. So held in *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113.

Ordering Removal of Closet Acting as Stop—Fall of Truck from Rails—Injury to Carpenter—Failure of Corporation's Superintendent to Discover Danger.—In *Osborne v. Morgan*, 137 Mass. 1, it appeared that the general superintendent of a manufacturing corporation designed for one of its mills a fixture consisting of a rail sixteen feet above the ground, on which was a moveable truck and chain; that the rail was designed to go from one side of the building to the other; that the foreman of the master mechanic made it too short, so that, at one end it only came within fourteen inches of the side of the building; that the master builder put it up and left it without a stop; that after the mill had been running some months, a closet was built under the end of the rail, so that, although it was not designed for the purpose, the truck could not get off of the rail while the closet remained; that the day after the closet was made, the general superintendent, not having noticed that the rail was too short, ordered the closet removed; and that while a carpenter was engaged in this work for the corporation, as directed by the master

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builder, the truck came off the rail and injured him. It was held that the general superintendent was liable to the carpenter, for failing in his duty to the carpenter, in ordering the removal of the closet, without ascertaining whether the removal would be attended with danger.

Repairing Bridge—Failure to Adopt Precautions for Protection of Workmen.—Where an agent in charge of the work of repairing a bridge has actually entered upon its performance for his employer, and those under him are injured by reason of his negligence in refusing to adopt proper precautions for their protection, he is personally liable to them. So held in *Kenney v. Lane*, 9 Tex. Civ. App. 150, 36 S. W. 1063.

Failure to Inspect Mine Ways—Injury to Miner—Liability of Mine Foreman.—A mine foreman, who neglected to examine the roads and ways in use in a mine, as required by Pa. Act. of June 2, 1891, was liable personally for injuries to a miner from such failure. So held in *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193, 33 Atl. 237.

Leaving Bundle of Wire upon Sidewalk—Personal Injuries.—For the creation or maintenance of a nuisance by negligently leaving a bundle of wire upon the sidewalk in front of his principal's premises, which resulted in personal injuries to a third person, who stumbled over it, an agent is liable to the party injured. So held in *Coon v. Fromont*, 25 N. Y. App. Div. 250, 49 N. Y. S. 305.

Bridge Construction—Fall of Scaffold—Removal of Stay-Laths—Injury to Hand—Liability of Constructor.—In *Fort v. Whipple*, 11 Hun (N. Y. Sup. Ct.), 586, it appeared that defendant was employed to build a bridge, and given sole management and control of the work and the hands; that under his direction and supervision a scaffold was erected, secured by stay-laths, upon which laborers worked and materials were placed; that some of such laths were removed by direction of defendant, plaintiff, one of the hands, aiding in doing so; and that subsequently the scaffold fell, and plaintiff was injured. It was held that the action (for damages for plaintiff's injuries) could be maintained against defendant.

Draining Cellar—Negligence in Construction of Tunnel—Injury to Adjoining House—Liability of Agent.—Where an agent dug a cellar for his principal, and after surface water had partially filled the cellar, discharged such water into the adjoining house of a third person through negligence in not properly filling an open tunnel which he dug for the purpose of draining the cellar, he was liable to the third person for the damage so inflicted. So held in *Martin v. Benoist*, 20 Mo. App. 262.

Fall of Wall—Bad Method of Raising It or Inadequate Supports—Death of Workman—Liability of Architect.—An architect, who had the general charge and superintendence of the construction of a building, was responsible for the death of a workman caused by the falling of a wall which resulted from the giving way of supports on which it rested, under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person employed by the owner of the building, and while the architect was absent, where it appeared that the manager of the jackscrew was employed under the advice of the architect, and was subject to his direction, and that he knew and approved of the method adopted for effecting the raising; as, whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, the accident was attributable to positive misfeasance on the part of the architect. So held in *Lottman v. Barnett*, 62 Mo. 159.

Moving Building—Negligence—Liability of Sub-Contractor to Owner.—Where a contractor contracts to move and fit up a building, and makes a sub-contract with others to do the work, the latter are liable to the owner of the building for injury to it from their negligence and misfeasance in doing the work, although there is no privity of contract between them. So held in *Bickford v. Richards*, 154 Mass. 163, 27 N. E. 1014.

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Personal Injuries from Negligent Construction of Wall—Liability of Contractor's Superintendent.—A person superintending the construction of a building, as agent of the contractor, is jointly liable with the contractor in an action for an injury to a third person, which resulted from culpable negligence in the construction of the walls of the building. So held in *Mayer v. Thompson-Hutchison Co.*, 104 Ala. 611, 16 So. 620.

Pit Dug by Permission of Land Owner—Absence of Lateral Support—Injury to Land of Another—Liability.—One who digs a pit on land so that, by the operation of ordinary and natural causes, which he takes no precautions to guard against, the land of a third person falls into the pit, is liable to the latter, without proof of actual negligence, although he was not the owner of the land in which he dug the pit, but made the excavation for his own benefit by permission of the owner of such land. So held in *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312.

Receiver with Knowledge of Defects in Equipment of Train—Personal Liability for Accidents.—An averment that the receiver of a railroad had knowledge of a material defect in the machinery and equipment of a train, and that with this knowledge he was running the train when the accident occurred, and that the accident was the result of the defect in the machinery and equipment of the train, charges a misfeasance and positive wrong on the part of the receiver, for which he was personally responsible. So held in *Erwin v. Davenport*, 56 Tenn. 45.

Inexperienced Employee Set to Work upon Defective and Dangerous Machine—Liability of Agent of Corporation.—An agent of a corporation, charged with the duty to provide safe machinery for the use of employees, who sets an inexperienced employee to work upon a machine which he knew to be defective and dangerous, was guilty of a misfeasance and liable to such employee for personal injuries resulting therefrom. So held in *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93.

In this case it is said in the opinion: "It was Semple's (the agent's) duty to have had this machine safe. His neglect to do so was nonfeasance. But that alone would not have injured the plaintiff if he had not set him to work upon it. To set him to work upon this defective and dangerous machine, knowing it to be dangerous, was doing improperly an act which might lawfully do in a proper manner. It was misfeasance. Both elements, nonfeasance and misfeasance, entered into the act or fact which caused the plaintiff's damages. But the nonfeasance alone could not have produced it. The misfeasance was the efficient cause."

Negligence in Driving Team over Plaintiff—Joint Liability of Driver and Owner.—In *Philips v. Wart*, 30 N. Y. 78, it appeared that plaintiff was run over by a team negligently driven by one of the defendants for his father. It was held that a joint action would lie against the driver and his father.

Servant's Participation in Mismanagement of Dangerous Machine.—A servant is liable for the immediate and obvious damage caused by the mismanagement of a dangerous machine in which he participated. So held in *Van Winkle v. American Steam Boiler Co.*, 52 N. J. L. 240, 19 Atl. 472.

Injuries Committed by Cattle—Liability of Agister.—The owner of cattle who places them in the hands of an agister is not liable for damages committed by them while they are under the control of the agister, it being the possession or control of the cattle which fixes the liability; and the law imposes upon the agister the duty to protect strangers from injury by them. So held in *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561.

Servant's Failure to Close Gap in Fence—Injury to Escaped Hogs.—In *Horner v. Lawrence*, 37 N. J. L. 46, it is held that a servant is liable to a third party for injury resulting from his intentionally

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leaving open a gap in the fence of a field in which the hogs of such third person were being pastured, so that he might perform his master's work with more ease to himself; his failure to close the gap being misfeasance.

Failure to Keep Premises in Repair—Liability of Lessor's Agent for Injuries to Third Person.—Where an agent is put in charge of property, with sole and absolute control and management of it, and full power to rent, and keep in safe condition for tenants, he is personally liable for personal injuries to a third party resulting from his failure to keep the premises in repair, whether the accident was caused by his nonfeasance or misfeasance. So held in *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491.

Agent with Knowledge That Barn Door on Tenant's Premises Was in Dangerous Condition—Death of Expressman.—Where the agent of a nonresident owner of a house and lot, having the same charge of the property as the owner would have had were he present, leases the property, with knowledge that one of the stable doors on the premises is in a dangerous condition; and an expressman, while engaged in delivering a load of kindling wood in the barn for one of the tenants, was killed by the falling of such door, it was held that the agent was liable to the personal representatives of deceased, and could not excuse himself on the plea of the liability of his principal. So held in *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384.

Agent's Failure to Keep Wharf in Repair for Tenants—Personal Injuries to Third Party.—In *Campbell v. Portland Sugar Co.*, 62 Me. 552, it appeared that agents of the sugar company had charge and management of a wharf of the company, and rented it to tenants, agreeing to keep it in repair; and that they allowed its covering to become old and insecure, by means of which plaintiff was injured. It was held that the agents were equally responsible to the injured person with their principal.

Admitting Water into Defective Pipe—Injury to First Floor Tenant.—An agent having the general management of a house of his principal is liable to the tenant of a shop on the first floor, for injuries resulting from his misfeasance in negligently directing water to be admitted into an obstructed water pipe in a room above, without seeing whether the pipe was in proper condition. So held in *Bell v. Josselyn*, 69 Mass. 309, 3 Gray, 63 Am. Dec. 741.

Negligence of Volunteer in Directing Work on Land of Another—Injury to Property of Third Person.—A person who superintends work done on land of another, and through whose negligence in directing the work, as well as that of the land owner, damage is done to the property of a third person by the work, is liable for the injury, although he was acting gratuitously, and not under any contract. So held in *Hawesworth v. Thompson*, 98 Mass. 77.

D. MALFEASANCE—LIABILITY OF AGENT OR SERVANT TO THIRD PERSON.

Although this question is not directly involved in our subject, it may claim some space on the negative side of the definition of misfeasance.

1. General Rule.

Of course if an agent or servant commits malfeasance, an act which no one can lawfully do or require another to do, and thereby injures a person other than his principal, he cannot exonerate himself from personal liability by showing that he was acting in his representative capacity.

United States.—*Estes v. Worthington* (C. C.), 30 Fed. Rep. 465; *Mitchell v. Harmony*, 13 How. (U. S.), 115.

Alabama.—*Hudmon Brothers v. Du Bose*, 85 Ala. 446, 5 So. 162; *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Warfield v. Campbell*, 35 Ala. 349.

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Arkansas.—*Gaines v. Briggs*, 9 Ark. 46; *Merchants & Planters Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406.

California.—*Brownell v. Fisher*, 57 Cal. 150; *Webb v. Winter*, 1 Cal. 417.

Connecticut.—*Bennett v. Ives*, 30 Conn. 329; *Church v. Mansfield*, 20 Conn. 284.

District of Columbia.—*Smith v. District of Columbia*, 12 App. D. C. 33, 25 Wash. L. Rep. 824.

Georgia.—*Nussbaum & Dannenberg v. Heilbron*, 63 Ga. 312; *Porter v. Thomas*, 23 Ga. 467.

Illinois.—*Burnap v. Marsh*, 13 Ill. 535; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416; *Lehmann v. Rothbarth*, 111 Ill. 185; *Marshall v. Eggleston*, 82 Ill. App. 52; *Reed v. Peterson*, 91 Ill. 288; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353.

Indiana.—*Blue v. Briggs*, 12 Ind. App. 105, 39 N. E. 885; *McNaughton v. City of Elkhart*, 85 Ind. 384.

Iowa.—*Carrahee v. Allen*, 112 Iowa, 168; *Maichen v. Clay*, 62 Iowa, 452, 17 N. W. 658.

Kansas.—*Barnhart v. Ford*, 37 Kan. 520, 15 Pac. 542.

Kentucky.—*Pool v. Adkisson*, 1 Dana (Ky.), 110.

Maine.—*Kimball v. Billings*, 55 Me. 147; *Richardson v. Kimball*, 28 Me. 463.

Massachusetts.—*Ballou v. Talbott*, 16 Mass. 461, 8 Am. Dec. 146; *Bickwell v. Dorion*, 33 Mass. 478; *Edgerly v. Whalan*, 106 Mass. 307; *Esty v. Wilmot*, 81 Mass. 168; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Hewett v. Swift*, 85 Mass. (3 Allen) 420; *McPartland v. Read*, 93 Mass. 231.

Michigan.—*Josselyn v. McAllister*, 22 Mich. 299; *Starkweather v. Benjamin*, 32 Mich. 306; *Weber v. Weber*, 47 Mich. 569, 11 N. W. 389.

Minnesota.—*Leuthold v. Fairchild*, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.

Missouri.—*Bank v. Byers*, 139 Mo. 627, 41 S. W. 325; *Mohr v. Langan*, 77 Mo. App. 481; *Peck v. Chouteau*, 91 Mo. 138, 3 S. W. 577; *Peckham v. Lindell Glass Co.*, 9 Mo. App. 459; *Thompson, Payne & Co. v. Irwin, Allen & Co.*, 76 Mo. App. 418; *Walter v. Hamilton*, 75 Mo. App. 237, 1 Mo. App. Rep. 344.

New Hampshire.—*Doty v. Hawkins*, 6 N. H. 247, 25 Am. Dec. 459.

New Jersey.—*Brokaw v. New Jersey, etc., Railroad Co.*, 32 N. J. L. 328, 90 Am. Dec. 659.

New York.—*Everett v. Coffin*, 6 Wend. (N. Y. Sup. Ct.), 603, 22 Am. Dec. 551; *Hibbard v. New York & Erie R. Co.*, 15 N. Y. 455; *Priest v. Hudson R. R. Co.*, 40 How. Prac. (N. Y.), 456; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Thompson v. M'Lean*, 32 N. Y. Sup. Ct. 736, 10 N. Y. Supp. 411.

Pennsylvania.—*Rice v. Yocum*, 155 Pa. St. 538, 26 Atl. 698.

Tennessee.—*Elmore v. Brooks*, 53 Tenn. 45.

Texas.—*Baker v. Wasson*, 53 Tex. 150.

Wisconsin.—*Oliver v. Morawetz*, 97 Wis. 332, 72 N. W. 877.

In *Bennett v. Ives*, 30 Conn. 329, it is said in the opinion: "The actual perpetrator of a positive and obvious wrong can never exonerate himself from personal liability by showing that he was acting as the agent or servant of another, or even by his superior's command. Story on Agency, §§ 308, 320. 1 Saund. Pl. & Ev. 84. *Lysley v. Clark*, 14 Eng. L. & Eq. 510."

In *Lee v. Matthews*, 10 Ala. 682, 44 Am. Dec. 498, it is said in the opinion: "The general rule of law, that agents properly authorized, acting for a known principal, without any personal undertaking, are not individually responsible, does not apply to torts, because no one can lawfully command another to commit a wrong."

Chitty on Pleading.—In *Chitty on Pleading*, vol. 1, p. 95, the author says: "An agent or servant, though acting bona fide under the

Note

direction and for the benefit of his employer, is personally liable to third persons for any tort or trespass he may commit in the execution of the orders he has received. If the master has not the right or power to do the act complained of, he cannot delegate an authority to his servant, which will protect the latter from responsibility."

2. Illustrations.

Conversion for Benefit of Master.—In *Porter v. Thomas*, 23 Ga. 467, 471, it is said in the opinion: "A servant may be charged in trover, though the conversion be done by him, however innocently, for the benefit of his master, and it is immaterial whether he had his master's authority or not."

Trover.—In trover it is no defense that defendant acted under the employment of another, who was himself a trespasser. So held in *Gaines v. Briggs*, 9 Ark. 46.

Nuisance.—An agent actively participating in an unlawful act, which creates a nuisance per se, is liable to a third party injured thereby. So held in *McNaughton v. Elkhart*, 85 Ind. 384.

Fraudulent Representations by Insurance Agent.—Where one was induced by fraudulent representations of the agent of an insurance company, to take a policy of insurance in the company, and to pay the premium thereon, he may recover against the agent the amount of the premium so paid. So held in *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25.

Assault by Railroad Employee.—A joint action of tort may be maintained against a railroad and its servant for an assault committed by the latter in discharging the duties imposed upon him by the railroad, although they might have been equally well discharged without the use of undue or illegal force. So held in *Hewett v. Swift*, 85 Mass. (3 Allen) 420.

Malicious Excess of Force in Ejecting Passenger.—If a conductor, in the execution of lawful instructions to remove a passenger from a car, use unnecessary force and wantonly injures the passenger, he, but not the corporation, is liable for such malicious excess of force. So held in *Hibbard v. New York & Erie R. Co.*, 15 N. Y. 455.

Servant Ordered to Close, and Keep Closed, Gate of Insufficient Dam—Injury to Land.—In *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735, it is held that where a servant, in obedience to a command of his master, does an apparent wrong to a third party, both the servant and his master are liable. In this case the rule was held applicable where the master ordered his servant to shut the gate of an unsafe and insufficient dam across a stream, and keep it shut until ordered to raise it, and in consequence of the servant's obedience of the order the dam broke, and an injury was done to the land of a third person.

Conversion of Wheat by Elevator Company.—But an agent of an elevator company, who, as such, received for it plaintiff's wheat, is not liable for conversion of it by his principal, which he did not otherwise participate in. So held in *Fitzpatrick v. Campbell*, 58 Minn. 20, 59 N. W. 628.

Trespass—Failure of Agent to Instruct Workmen as to Boundaries.—And where the managing agent of a corporation neglects to instruct his workmen as to boundaries and they consequently trespass, if he is liable at all, it is in case for negligence, and not in trespass *quare clausum*. So held in *Bath v. Caton*, 37 Mich. 190.

A. R. Y.

SOUTHERN RY. CO. v. STATE.

(Supreme Court of Georgia, May 11, 1906.)

[54 S. E. Rep. 160.]

Corporations—Neglect of Public Duty—Indictment.—A corporation is not, merely because it is a creature of the law without physical existence, immune from indictment and criminal prosecution for non-feasance in neglecting to perform duties which it owes to the public.

Railroads—Accommodations for Passengers—Drinking Water—Constitutional Law.*—It is within the constitutional power of our General Assembly to impose upon a railway company the duty of providing an adequate supply of pure drinking water for its passengers while journeying upon its cars, and to provide that the corporation shall be indicted, prosecuted, and fined for a neglect of this public duty.

(a) In so far as the Legislature has undertaken to inflict upon violators of Pen. Code 1895, § 522, punishment other than fine, the punitive clause thereof is inoperative, because incapable of enforcement.

(b) That section is not, however, violative of the constitutional requirement that all general laws shall have uniform operation, since all violators convicted thereunder must necessarily be punished in the same way, by fine and not otherwise.

Corporations—Indictment—Process.—When a corporation which is under indictment voluntarily makes an appearance in the court by its attorney and demurs to the indictment, it thereby waives service of process upon it in the manner pointed out by statute.

(Syllabus by the Court.)

Error from Superior Court, Appling County; L. A. Parker, Judge.

The Southern Railway Company was indicted for violation of Pen. Code 1895, § 522. From an order refusing to sustain a demurrer to the indictment, defendant brings error. Affirmed.

De Lacy & Bishop, for plaintiff in error.

Ino. W. Bennett, Sol. Gen., for the State.

EVANS, J. The Southern Railway Company was indicted for violating Pen. Code 1895, § 522, the indictment charging that the defendant "did run and operate passenger cars, to wit, a passenger car on train No. 13, the same being passenger cars upon which passengers were transported, and did then and there fail to keep in such passenger cars an adequate supply of good,

*For the authorities in this series on the subject of the constitutionality of statutes prescribing a penalty to compel common carriers to perform their duties to the public, see foot-notes appended to *Frasier v. Charleston & W. C. Ry. Co. (S. Car.)*, 19 R. R. R. 768, 42 Am. & Eng. R. Cas., N. S., 768; *Chicago, etc., Ry. Co. v. Anderson (Neb.)*, 19 R. R. R. 333, 42 Am. & Eng. R. Cas., N. S., 333; foot-notes appended to *Seegers Bros. v. Seaboard Air Line Ry. (S. Car.)*, 19 R. R. R. 83, 42 Am. & Eng. R. Cas., N. S., 83.

For the authorities in this series on the subject of the police powers of a state over railroad companies, see foot-note appended to *Chicago, etc., Ry. Co. v. People (U. S.)*, 19 R. R. R. 657, 42 Am. & Eng. R. Cas., N. S., 657.

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pure drinking water during the day and night for the use of passengers." On the call of the case for trial, the defendant demurred to the indictment, and the demurrer was overruled. The defendant's counsel then orally move the court to quash the indictment, because service had not been made on the defendant as required by Pen. Code 1895, § 938. The court denied the motion to quash, and continued the case for the term in order that proper service might be made. The bill of exceptions complains of the overruling of the defendant's demurrer, and of the refusal of the court to quash the indictment for want of service on the defendant.

1. Several grounds of the demurrer present the proposition that a corporation is not indictable. In *McDaniel v. Gate City Gas Light Co.*, 79 Ga. 61, 3 S. E. 693, this language was used: "The defendant is a corporation. We do not understand that in this state a corporation can be indicted for an offense." This remark was made by Mr. Justice Blandford in the course of his argument to prove that the penalty imposed by the third section of the act of February 26, 1876 (Civ. Code 1895, § 1867), on corporations for neglecting or refusing to record bonds issued by them in the office of the Secretary of State was enforceable by civil action. It was not necessary, for the decision of any question involved in that case, to hold that a corporation was not indictable; and the quoted extract is obiter. The question was attempted to be raised in a later case, but it was there held that it was too late, after voluntarily going to trial upon the merits, for a corporation to contend that it was not liable to indictment, and the point was not ruled. *So. Express Co. v. State*, 114 Ga. 226, 39 S. E. 899. So the proposition that a corporation may not be indicted is an open one in this state. "Lord Holt is reported as having said that a corporation is not indictable, but the particular members of it are. This doctrine, however, if it has ever obtained, is not now recognized in any jurisdiction." 1 Clark & Marshall on Priv. Corp. § 246. And it is now very generally held that a corporation may be indicted and fined for offenses consisting of mere nonfeasance, as where it neglects to perform duties which it owes to the public. *Id.* § 247; 7 Am. & Eng. Enc. Law, 841. The old idea that, inasmuch as a corporation was created for lawful purposes and had no power to do anything unlawful, it was not responsible for the acts of its servants or officers in excess of its charter authority, has long since been repudiated. An action of trespass, as well as of trespass on the case, will lie against a corporation. *Central Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250. It is perfectly competent for the creator of this artificial person to prescribe corporate responsibility for failure to perform certain acts which may be required of it. Nor can there be any possible objection that corporate disobedience of the sovereign's command may be punished by fine, or by forfeiture of charter. With the power in the state to inflict a penalty for the violation

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of a statute enjoining a duty, it matters little whether the procedure be in its nature civil or criminal. In some instances the remedy by indictment is more efficacious and prompt than by civil action. While a corporation may not be imprisoned, it may be fined, and the fine enforced by levy on its property.

2. Another ground of the demurrer is that it is not the inherent duty of a railroad company to furnish drinking water for its passengers, and that a failure to do so cannot be made a crime by legislation. It would certainly be startling doctrine to deny the Legislature the power to impose a duty upon a corporation and require its performance, when there is no constitutional restraint. The demurrer also makes the point that Pen. Code 1895, § 522, is unconstitutional in so far as it undertakes to make a violation of the same a misdemeanor, because the punitive clause is impossible of enforcement, and because the Constitution of this state (Civ. Code 1895, § 5732) provides that the "laws of a general nature shall have uniform operation throughout the state"; that Pen. Code, § 1039, provides that "every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain-gang * * * not to exceed twelve months, and any one or more of the punishments may be ordered in the discretion of the judge"; and that the provision in section 522, that a violation thereof shall be punished as for a misdemeanor, "is not uniform, for that it is manifestly impossible to impose on a railroad company, as such, a sentence or punishment of imprisonment or work in the chain-gang or any public works, as may be imposed upon a natural person convicted of a similar offense or misdemeanor, and it is also impossible for the judge to exercise the discretion with which he is invested, of imposing any one or more of said punishments prescribed for misdemeanors," wherefore that section of the Penal Code militates with the above-mentioned provision of the Constitution. From the very nature of the case, only so much of section 1039 as prescribes a fine is enforceable; so much as relates to imprisonment is inoperative.

3. This clause of the Constitution was intended to operate only on laws which declared rights, provided remedies, or denounced certain acts as criminal—to laws complete in themselves. The punitive feature is only a part of a law, and for convenience the Legislature fixed a general punishment for those convicted of misdemeanors. In effect, this section (1039) became a part of every section of the Penal Code which defined a misdemeanor. The mere inappropriateness of a portion of the penalty would not serve to render section 522 obnoxious to the constitutional provision as to general laws having uniform operation. That section applies only to railroad companies, and all corporations convicted thereunder must necessarily be punished alike, though not, of course, in the same way as may be violators of another penal statute which declares that they may be punished as for a misdemeanor.

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4. Pen. Code 1895, § 938, provides the process against a corporation which has been indicted. As this intangible person has no physical existence and cannot be taken under warrant, the Legislature has provided a certain mode of service by which the court acquires the power to hear and determine the charge against the corporation under indictment. The sole purpose of the service and notice provided in that section is to bring the artificial person before the bar of the court for trial. Until service is had in the prescribed way, or is waived by the corporation, the trial cannot legally proceed. If the corporation voluntarily appears in court by attorney and demurs to the indictment, the corporation is before the court, and further proceeding may be had without reference to the regularity of the service. Its appearance and pleading by demurrer may be analogized to the voluntary action of a natural person who, hearing of an indictment against him, comes into court without waiting for process to be issued against him, and demurs, or otherwise pleads to the indictment. After demurrer or plea, it is of no consequence whether a warrant issued for his arrest or not; by his voluntary act the court acquires control over his person for all purposes of the particular trial. Likewise, when the defendant corporation demurred to the sufficiency of the indictment, it submitted itself to the jurisdiction of the court in the particular case, and it then became immaterial whether the service was regular or irregular. There was no error in refusing to quash the indictment because of irregularity or insufficiency of the service.

Judgment affirmed. All the Justices concur.

CRANDALL v. MINNEAPOLIS, ST. P. & S. S. M. Ry. Co.

(Supreme Court of Minnesota, Dec. 15, 1905.)

[105 N. W. Rep. 185.]

Carriers—Injury to Passengers—Vestibule Doors—Negligence.*—

Action to recover damages for personal injuries sustained by the alleged negligence of the defendant in failing to keep the vestibule doors at the rear of its sleeping car closed between stations. Held:

1. The defendant was not bound to have the car vestibuled; but, having done so, it could not lead passengers to believe that the doors of the vestibule would be kept closed between stations, and then negligently leave them open, without incurring liability to a passenger injured thereby.

2. Evidence herein is sufficient to sustain the verdict to the effect that the defendant was thus negligent.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

*For the authorities in this series on the subject of a carrier of passengers' duties with respect to opening and closing car doors, see foot-notes appended to *Weinschenck v. New York, etc., R. R. (Mass.)*, 19 R. R. R. 722, 42 Am. & Eng. R. Cas., N. S., 722.

Crandall v. Minneapolis, etc., Ry. Co

Action by Henry Crandall against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Bright and Munn & Thygeson, for appellant.

Giantvalley & Doyle, for respondent.

START, C. J. This action was brought to recover damages for personal injuries sustained by the minor son of the plaintiff by reason of the alleged negligence of the defendant, in that the vestibule doors at the rear end of its train were left open between stations for an unnecessary length of time. Verdict for plaintiff in the sum of \$1,000. The defendant made a motion for judgment notwithstanding the verdict, which was denied. Judgment on the verdict, and the defendant appealed from the judgment.

The sole question presented by the record is whether the evidence entitled the defendant to a directed verdict in its favor, for the reason that there was no evidence of negligence on its part. The record discloses evidence tending to show: That the boy, who was only seven years old, was a passenger in the care of his aunt on a regular passenger train from Boston to Minneapolis, which passed over the defendant's railway line from Sault Ste. Marie, Mich. (hereafter referred to as the Soo), to its destination; that they occupied a sleeper, which was the rear car in the train; that the rear platform of the car was vestibuled, with a door on each side thereof and a railing at the rear; that when the doors were opened the rear platform was substantially the same as the platform of an ordinary passenger car, but when they were closed the vestibule was a safe place for passengers to ride in; that on this car the doors of the vestibule were closed between stations east of the Soo, and passengers rode in it, with the knowledge of the employees in charge of the car; that during the forenoon of the day the boy was injured the aunt went with him upon the vestibuled platform several times, and observed that the doors were closed, and in response to her inquiry whether it was safe for him to remain there she was assured by the porter in charge of the car, who accompanied it throughout the trip, that it was, as everything was securely fastened; that when the car reached the Soo at about 5 o'clock in the afternoon it stopped, and the doors of the vestibule were opened for the purpose of permitting passengers to alight, and also for the purpose of furnishing the car with ice and supplies; that when the train left the Soo the doors were left open until the brakeman, commencing at the front of the train, would arrive at the rear to close them; that when the train had gone at least 10 miles after leaving the Soo the doors were still open, which fact was unknown to the aunt, who, believing that they were closed, permitted the boy to go out upon the platform to throw away a bottle; that he did not return, and she went out to look for him, and found that he had fallen off, and that the doors were open; and, further, that the boy was injured by falling from the car.

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The defendant was not bound to have the car vestibuled; but, having done so, it could not by acts and words lead its passengers to believe that the doors of the vestibule would be kept closed between stations, and then negligently leave them open, without incurring liability to passengers injured thereby. See *Sansom v. Ry. Co.*, 111 Fed. 887, 50 C. C. A. 53; *Bronson v. Oakes*, 76 Fed. 734, 22 C. C. A. 520. Whether the defendant in this case led the aunt to believe that the doors would be kept closed between stations, whether it negligently kept them open for an unreasonable time after the train left the Soo, and whether such alleged negligence was the proximate cause of the boy's injury, clearly were, upon the evidence, questions of fact. It follows that the defendant was not entitled to a directed verdict. Judgment affirmed.

SOUTHERN RY. CO. v. WATERS & CO.

(Supreme Court of Georgia, May 16, 1906.)

[54 S. E. Rep. 620.]

Carriers—Carriage of Goods—Connecting Carriers.*—When there are several connecting railroads of different companies, and the goods are intended to be transported over more than one, each company is responsible to its own terminus before delivery to the connecting railroad, and the last company which received the goods as "in good order" is responsible to the consignee for any damage, open or concealed, done to the goods, and the companies must settle among themselves the question of ultimate liability.

Same—Evidence—Presumption—Receipt.—If a railroad company receives from another railroad company goods to be transported, and receipts for them as "in good order," the company so receiving and receipting is concluded by the receipt from setting up, as against the consignee, that the goods were in fact not in good order when received.

Same.*—Goods received by a railroad company from a connecting line, to be transported over its own road, are, in the absence of a statement to the contrary in a receipt for the goods, presumed to have been received as "in good order"; but this presumption may be rebutted by proof showing that no receipt was given, and that the goods were in fact not in good order when received.

Same.*—A railroad company, receiving goods from a connecting line, may protect itself from the conclusive presumption arising from a receipt expressly stating that the goods were "in good order," or from a rebuttable presumption arising from a failure to state the condition of the goods in a receipt, by a receipt setting forth an exemption as to the condition of the goods. Any statement in the receipt negating that the goods, when received, were in good order, will relieve the company from a presumption that they were in such condition.

*See foot-notes appended to *Gulf, etc., Ry. Co. v. Jackson & Edwards* (Tex.), 19 R. R. R. 125, 42 Am. & Eng. R. Cas., N. S., 125, foot-notes appended to *Southern Ry. Co. v. Vaughn* (Miss.), 18 R. R. R. 334, 41 Am. & Eng. R. Cas., N. S., 334; foot-notes appended to *Houston, etc., R. Co. v. Everett* (Tex.), 18 R. R. R. 578, 41 Am. & Eng. R. Cas., N. S., 578.

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Same—Instructions.—The judge erred in the charge excepted to, and in the refusal to charge as requested, and the verdict was unsupported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Waters & Co. against the Southern Railway Company. From a judgment in favor of plaintiffs, defendant brings error. Reversed.

Waters & Co. sued the Southern Railway Company in a justice's court. The cause of action set forth was in substance: On or about March 1, 1904, plaintiffs purchased of Hodges & Sons, of Manassas, Ga., 11 barrels of syrup, which were delivered to plaintiff by defendant in Atlanta, Ga., on March 21, 1904. When delivered, the goods were in a damaged and bad condition, being fermented and sour, and the hoops loose on the barrels; the goods having been received by the railway company in good order, and damaged as aforesaid. The time consumed in conveying the goods from Manassas to Atlanta was unreasonable, and plaintiffs were thereby damaged. There was also set forth a cause of action under the tracing act," but this was stricken at the trial. The defendant filed an answer setting up a general denial of liability. The case was carried by appeal to the superior court. The trial in that court resulted in a verdict in favor of the plaintiffs for the full amount sued for. The defendant filed a motion for a new trial upon the general grounds, and subsequently an amendment was added containing two special grounds. Error was assigned upon the charge of the court to the effect that if the Southern Railway Company, as the last connecting carrier, only showed that it excepted to the condition of the syrup to the Seaboard Air Line Railway on the condition of the barrels, and not on the ground that it was sour and fermented, that exception would not rebut the presumption that it was sour and fermented when received by it. The other assignment of error was upon the refusal of the judge to charge that the plaintiffs cannot recover on that petition of their cause of action which attempted to set forth liability on the part of the railway company for receipting for the goods as "in good condition," or for failing to receipt at all, if the jury believe that the company made exception on receipt of the goods from the connecting line. The motion was overruled, and the defendant excepted.

The material portions of the evidence were, in substance: A bill of lading issued by the Seaboard Air Line Railway at Manassas, Ga., dated March 1, 1904, for 11½ barrels of syrup, weight 5,275 pounds, received as in apparent good order. An expense bill, dated Atlanta, Ga., March 17, 1904, issued to plaintiff for 11½ barrels of syrup, stating "all leaking badly," and marked "Paid," March 21, 1904. The invoice of Hodges & Sons, showing the number of barrels and number of pounds in the bill

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of lading, at 35 cents, \$153.85, dated March 1, 1904. A witness for plaintiff testified that during March, 1904, syrup of the best quality was worth 35 to 40 cents per gallon, and the usual time consumed in the transportation of freight between Manassas and Atlanta was from 36 to 48 hours. One of the plaintiffs testified that his firm had purchased the syrup from Hodges & Sons at the invoice price of 35 cents per gallon, and that it was delivered by the Southern Railway Company in Atlanta on March 21, 1904. At the time of delivery all of the barrels were leaking, and the syrup, when received, was only fit for reboiling. He sold it as early as possible for 15 cents per gallon, which was all that it was worth; the syrup being sour and fermented. The fermentation would begin about 4 or 5 days, after 48 to 96 hours on the road, when roughly handled; and, when fermentation set up, the syrup was useless except for reboiling. In his opinion 3 or 4 days was ample for the syrup to reach Atlanta from Manassas. The syrup was of the best quality, and its market price was 35 or 40 cents per gallon, and the firm had lost the amount sued for \$95. A witness introduced by the defendant testified that he was the agent of the Southern Railway Company at Helena, Ga., which was the junction point of the Southern and the Seaboard Railway, coming from Manassas. He remembered the shipment of syrup from Hodges & Sons to the plaintiff. It was delivered by the Seaboard to the Southern at Helena on March 16, 1904, and the syrup left Helena on March 16. "He took exceptions on this shipment, only stating 'All leaking badly,' and the same was signed by himself and the agent of the Seaboard at Helena." The distance from Helena to Atlanta is 167 miles, and in making the trip it is necessary for a freight car to be switched through the freight yard at Macon, necessitating considerable time, and the distance from Manassas to Helena is about 87 miles.

Lamor Rucker, for plaintiff in error.

Moore & Pomeroy, for defendants in error.

COBB, P. J. (after stating the foregoing facts). 1-3. The propositions stated in the first three headnotes need no elaboration. See Civ. Code 1895, § 2298; *Forrester v. Ga. R. Co.*, 92 Ga. 697, 19 S. E. 811; *Ga. R. Co. v. Forrester*, 96 Ga. 428, 23 S. E. 416; *Susong v. F. C. & P. Ry. Co.*, 115 Ga. 363, 41 S. E. 566; *Kavanaugh v. So. Ry. Co.*, 120 Ga. 62, 47 S. E. 526.

4. A railroad company receiving goods from a connecting carrier is generally not liable for damages to the goods when not caused by its own act. If it receipts for the goods as in good order, when in fact they were not in that condition, the law raises against it a conclusive presumption as to the condition of the goods. If it receipts for the goods without any statement as to their condition, the law raises a rebuttable presumption that they were in good order when received. On a receipt of the first character, a railroad company is required to settle with the

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consignee and look for reimbursement to the carrier upon whose line the damage occurred. In a receipt of the second character, the railroad company may defeat liability by showing that the goods were in a damaged condition when received by it. If the character of the receipt given is, however, such that it clearly indicates an intention on the part of the carrier not to receipt for them as in good order, there is no presumption as to the condition of the goods when they were received, and the burden is upon the consignee to show that the damage occurred on the line of the defendant. In this case the shipment was of barrels of syrup. The defendant received them from a connecting line, and in its receipt stated that the barrels were leaking badly. A shipment consisting of goods in barrels, such as syrup or the like, is certainly not in good order if the barrels are leaking badly, and an exception of this character in the receipt by the carrier will prevent any presumption arising that the goods were in good order. The law allows the carrier to protect itself against the presumption of law growing out of the terms of its receipt, or out of the silence of the receipt in reference to the condition of the goods. An exception by a carrier in a receipt for goods delivered to it, when the goods consist of liquids in barrels, that the barrels are leaking badly, ought certainly to be treated as a refusal on the part of the carrier to commit itself to the proposition that it received the goods as in good order. Barrels containing liquids cannot be in good order when they are leaking badly.

5. Under the facts in the present case, the plaintiff did not have the benefit of any presumption in their favor as to the condition of the goods at the time they were received by the defendant. The burden was upon the plaintiff to show the condition of the goods at the time the defendant received them, and that they were in a worse condition when delivered at the point of destination than when they were received, as a result of the negligence alleged against the defendant. The judge erred in the charge excepted to, and in refusing to charge as requested, and the verdict is unsupported by the evidence.

Judgment reversed. All the Justices concur.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* PATRICK.

(Circuit Court of Appeals, Eighth Circuit, March 28, 1906.)

[144 Fed. Rep. 632.]

Carriers—Contract of Shipment.—Neither a bill of lading nor any other writing is necessary to constitute a contract of shipment, an oral contract, in the absence of fraud or imposition, when satisfactorily proved, being as obligatory on both carrier and shipper as a written one.

Same—Evidence of Contract—Unsigned Bill of Lading.—Plaintiff, through an agent, delivered certain goods to defendant railroad company for shipment, and asked for a bill of lading, which was

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given, but the station agent neglected to sign it. The goods having been lost, plaintiff brought suit for their value, setting up the writing as the contract of shipment. Held, that the paper, while not constituting a written contract, was evidence of the contract actually made, and, in the absence of any evidence to the contrary, established the terms of such contract.

Same—Limitation of Liability for Loss of Goods.*—A contract, by which the liability of a carrier for loss of goods in shipment is limited to an agreed value per hundred pounds, in consideration of a reduced rate given the shipper, is valid and enforceable.

Same—Contract of Shipment—Estoppel.—Where a shipper accepted and acted on a paper given to his agent as a bill of lading, and which contained a provision limiting the carrier's liability in case of loss, he cannot deny that such was the contract, on the ground that his agent was unable to read it.

Appeal and Error—Affirmance—Remission of Part of Recovery.—Where a railroad company, when sued by a shipper for a loss of goods, pleaded a limitation of its liability, but did not tender or offer to pay the amount due upon its own construction of the contract, and, relying on another defense, contested the case and carried it through several courts, incurring heavy costs, on a final decision sustaining its contention as to the limitation, the appellate court will affirm the judgment for the reduced amount on a remittitur of the excess by plaintiff.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 88 S. W. 330.

Clifford L. Jackson, for plaintiff in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Defendant in error, who was plaintiff below, delivered to defendant's station agent at South Canadian two boxes of goods to be carried to Durant, Ind. T. On delivery of the boxes, plaintiff, who was acting through his wife as agent, requested a bill of lading. The station agent gave him what purported to be one, fixing the terms and conditions of shipment, but neglected to sign it. By its provisions plaintiff, in consideration of a reduction of about 33 per cent. from the regular freight rate to Durant, stipulated to release the railroad from liability for all loss, except \$5 for each hundred pounds of goods carried. The reduced rate of freight was paid, but the goods were never carried to Durant, but were lost. Plaintiff, ignoring the stipulation for limited liability, sued the railroad company in a trial court of the Indian Territory for the full value of the goods. He filed his supposed bill of lading, with his petition, as the contract sued on, and, at the trial which followed, offered it in evidence to prove his right of recovery. Judgment was rendered in his favor for the actual value of the goods, \$60.40, and an appeal was taken to the United States Court of Appeals in the Indian Territory, where the judgment of the lower court was affirmed. The limitation of the amount of recovery for the loss, as specified in the contract, was held by

*See foot-notes appended to *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787.

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the latter court to be invalid, and the common-law liability was held to attach for the full value of the goods lost because the bill of lading, or contract, was unsigned. A writ of error taken from this court raises the single question whether the contract as made limits plaintiff's right of recovery to \$5 per hundred-weight of the goods shipped.

The United States Court of Appeals for the Indian Territory, in the course of its opinion, says:

"But the paper issued and denominated a bill of lading in the case at bar was never signed by the carrier, and by reason of that fact it was not a bill of lading, and consequently the pretended limitation of liability stated therein was not binding on the appellee, and none of its provisions were binding on either the carrier or the shipper. Therefore there is no evidence that any verbal or written contract was made between the parties, limiting the common-law liability of the carrier."

For want of the signature of the defendant's agent the paper sued on was not a bill of lading, nor in itself a contract. This may be conceded, but the concession does not dispose of the case. Neither the bill of lading nor any written contract were necessary to constitute a contract of shipment. It may be orally made, and when so made, in the absence of fraud or imposition, it is as obligatory upon both the shipper and carrier as a written one. The difficulty generally arises in establishing its terms by parol, but, when once established, it determines the rights and obligations of the parties, except as affected by statutory law, as conclusively as if it had been in writing and in the accepted form of a negotiable bill of lading. Elliott on Railroads, vol. 4, § 1503; Hutchinson on Carriers, § 242; Railway Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, and cases cited.

The paper sued on, in our opinion, was very satisfactory evidence of the contract of shipment as actually made. Something was asked by the shipper's agent, expressing the obligation of the carrier, and, pursuant to her request, the paper in question was given her. She forthwith delivered it to her husband, who used it in making a claim for compensation for his loss; filed it as an exhibit in the case showing his contract with defendant; and offered it in evidence at the trial to substantiate his right. More than this, he took the benefit of the low rate of freight specified in the paper. He paid only two-thirds of the established rate for unlimited common-law liability. If the station agent, instead of answering the shipper's question by handing to him the paper purporting to be a bill of lading, had orally made use of the language employed in the paper, and the parties had acted upon it, as they did in this case, no one would question the competency of his statement to prove the contract. A fortiori, the paper in question was competent evidence. It eliminated much, if not all, the uncertainty attending proof of oral contracts.

Some evidence appears in the record tending to show that plaintiff's agent, who negotiated the contract of shipment with

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defendant's station agent at South Canadian, could not read, and did not know or appreciate the force of the provision limiting defendant's liability. The printed but unsigned paper was received and acted upon by her as the contract of shipment. There is no evidence of any fraud, hasty action, imposition, or other conduct on the part of the station agent tending to prevent the shipper's agent from knowing or understanding the contents of the paper. Moreover, the husband, after receiving the paper, with full knowledge of all the facts, adopted and ratified it as his contract with the carrier. For both these reasons he cannot be heard to say that his agent did not read or appreciate the provisions of the contract from which he now seeks to escape. *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Schaller v. C. & N. W. Ry. Co.*, 97 Wis. 31, 71 N. W. 1042.

As there is no evidence to the contrary, the statement made to plaintiff's agent in and by the unsigned paper, and acted upon by both his agent and himself, must be treated as the contract of shipment. It contains a clear provision limiting, in consideration of reduction in freight charges, the liability of the carrier for loss of the goods shipped by the plaintiff. This is a lawful and enforceable stipulation, even as to goods lost or destroyed by the negligence of the carrier. *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Liverpool Steamship Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 442, 9 Sup. Ct. 469, 32 L. Ed. 788; *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 15, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Chicago Mil. etc. Railway v. Solan*, 169 U. S. 133, 135, 18 Sup. Ct. 289, 42 L. Ed. 688; *Cau v. Texas & Pac. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053.

In the leading case of *Hart v. Railroad Co.*, it is said:

"It is just to hold the shipper to his agreement fairly made as to value, even when the loss or injury was occasioned through the negligence of the carrier. * * * The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond to that value for negligence."

It results that plaintiff was not entitled to recover the full value of the goods lost, but only the agreed value of \$5 per hundredweight, which amounts to \$7.50. The defendant railway company, while pleading that its liability was limited to that sum, did not tender it to plaintiff either before or during the trial, but pleaded, as a further defense, a failure on plaintiff's part to present a claim for damages sustained by him within 30 days after it accrued, according to the requirements of the contract of shipment. The proof fails to sustain that plea. As a result this small case has been carried through four courts, and heavy costs have been incurred which might have been avoided, if defendant had seasonably offered to pay what it lawfully owed to plaintiff. Such being the case, we do not deem it just to so

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reverse this judgment as to cast the heavy burden of costs upon the plaintiff.

Our conclusion is that the judgment must be reversed, unless, within 40 days after the filing of this opinion, the plaintiff files in the clerk's office of the United States Court for the Central District of the Indian Territory, at South McAlester, a remittitur of \$52.90, and, within 10 days thereafter, files with the clerk of this court a certified copy of the record showing the filing of such remittitur. If such remittitur and certified copy thereof be filed, a judgment will then be entered affirming the judgment to the extent of \$7.50. If such remittitur and certified copy be not filed within the times aforesaid, the judgment will be reversed, with directions to grant a new trial.

PHOENIX POWDER MFG. CO. v. WABASH R. CO.

(Supreme Court of Missouri, June 1, 1906.)

[94 S. W. Rep. 235.]

Carriers—Release of Liability—Constructive Notice to Shipper—Presumptions.—Where a railroad, in compliance with the interstate commerce act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), filed with the Interstate Commerce Commission a printed schedule of tariffs showing rates of freight then in force, but in a contract of shipment no rate was fixed verbally or in writing, and no allusion made to a reduced rate, the bill of lading, being silent as to the rate, no presumption obtained that the shipper knew a reduced rate was charged because the printed receipt contained a clause limiting the road's liability, so as to exonerate it from liability for loss of the freight through negligence.

Courts—Appellate Courts—Jurisdiction—Federal Questions.—Such construction of the contract did not violate Const. U. S. Amends. 5, 14, and Const. Mo. art. 2, § 30, in that it denied to the carrier the equal protection of the laws of the United States, deprived it of its property without due process of law, or denied a right, privilege, and immunity guarantied it by such federal and state Constitutions and laws, or present a case with said interstate commerce act, so as to give the Supreme Court jurisdiction of an appeal therein.

In Banc. Appeal from St. Louis Circuit Court; Horatio D. Wood, Judge.

Action by the Phoenix Powder Manufacturing Company against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Appeal ordered transferred to St. Louis Court of Appeals.

George S. Grover and *Henry W. Blodgett*, for appellant.
Kinealy & Kinealy, for respondent.

GANTT, J. This is an appeal from a judgment of the circuit court of the city of St. Louis, for the plaintiff for \$1,548.97. The action was for damages to the amount of \$2,000 for a failure to safely carry from St. Louis to Twist, Tex., 800 kegs

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of blasting powder, 80 cases of 40 per cent. dynamite and 2 barrels of D. T. Fuse, and to deliver the same to W. R. Stubbs Contracting Company in as good condition as when received by defendant. While en route, the car, in which the said powder was stored was destroyed by fire, and said powder was never delivered. The defendant pleaded a special written contract with plaintiff whereby in consideration of a reduced rate of freight, it undertook to transport said goods to the end of its line only, and that, by said special agreement, neither defendant nor any of its connecting lines should be liable for the loss of said property occasioned by fire or the negligence of defendant or its connecting carriers, and would not be liable for any damages to the said property after it was receipted for in good order by the next succeeding carrier, and for the same consideration, it was agreed that in case of loss, the value should be computed as of the time and place of shipment, and said property should be transported at plaintiff's risk, and that it faithfully complied with said contract and transported said property safely over its line to Kansas City, the end of its line, and there safely delivered the same to the Rock Island Railway Company, and said company safely transported the said property to Bowie, Tex., and there safely the same to the Ft. Worth & Denver Railway Company, and that, while in the possession of the last-named company, at Bowie, Tex., it was accidentally destroyed by fire. The reply was a general denial of the new matter set up in the answer, and also set up facts surrounding the destruction of the car of explosives, and upon those facts charged that the destruction of the car was due to the negligence of the defendant. On the first trial of the case the plaintiff was nonsuited in the circuit court, and appealed to the St. Louis Court of Appeals and the judgment was reversed, and the cause remanded with a direction that the only matter to be investigated in the case, was the amount of the damage sustained by plaintiff. *Phoenix Powder Co. v. Railroad Co.*, 101 Mo. App. 442, 74 S. W. 492.

Upon the return of the case to the circuit court, an amended answer was filed which was the same as the original answer except that it contained the following allegations: "Defendant says that in the month of March, 1901, as well as long prior thereto, a certain act of Congress of the United States, entitled 'An act to regulate commerce,' approved February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] with the various amendments thereto, enacted by said Congress in the years 1888, 1889, and 1891, respectively, was in full force, and controlled all shipments over the railroad of defendant from all points on its line in Illinois and Missouri, to all points on its connecting lines in the state of Texas, and elsewhere beyond the state line of Missouri. That in due compliance with said law of the United States then and there in force as aforesaid, defendant had in March, 1901, and still has, on file with the Interstate Commerce Commission, a body created by said act of Congress above cited, at the office of said Commission in the city of

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Washington, D. C., its printed schedules or tariffs, showing the rates of freight then in force, for all classes of property, including live stock, from all points on its own railway in one state, to points on its own and connecting lines of railway in other states. That said schedules and tariffs were then, as now, duly printed, published and filed by defendant, in strict conformity to the said laws of the United States then in force as aforesaid. That said act of Congress of the United States, entitled 'An act to regulate commerce,' approved February 4, 1887, with the various amendments thereto, enacted by said Congress of the United States, in the years 1888, 1889, 1891, respectively, were in full force and effect as said time, and are now valid statutes, duly enacted by said Congress of the United States, and that said Congress of the United States was then, as now, duly authorized and empowered to enact such laws, and that, under said valid statutes of the United States, said contract of shipment, as contained in the bill of lading hereinbefore set forth, supported, and based upon said reduced rate as aforesaid as a consideration therefor, as hereinbefore set forth, was a valid and subsisting agreement for the transportation of the property therein described, between the states therein named, which could not, under the penalties then and there prescribed by said valid statutes of the United States be departed from, varied, modified, controlled, abrogated, or repudiated by either the plaintiff or defendant herein. Further answering, defendant says that any construction of said statutes of the United States, or upon said interstate contract of shipment, as aforesaid, placed upon either said statutes or said contract of shipment which would abrogate, modify, or destroy said contract, as hereinbefore set forth, would be a violation of the fifth and fourteenth amendments to the Constitution of the United States, as well as of section 30 of article 2 of the Constitution of Missouri, in that such a construction by said courts, of said statute, or of said contract, would deny to the defendant herein the equal protection of the laws of the United States, and also deprive the defendant herein of its property without due process of law, and also deny to the defendant herein, a right, privilege and immunity guarantied to it by the Constitution and laws of the United States, as well as of the state of Missouri. Wherefore defendant says that plaintiff ought not to have or maintain this action, and having fully answered, prays to be discharged with its costs."

The reply denied all new matter contained in the amended answer. Upon the trial the bill of lading was in evidence and no rate of freight was named in it, and there was absolutely no pretense that the plaintiff or any agent of it and the defendant, or any of its agents had ever agreed verbally upon a reduced rate or even discussed such a thing. There was not a word to show plaintiff knew it was to receive a reduced rate, and there was no testimony to show plaintiff was in the habit of shipping over defendant's road. While defendant's counsel concede this, they seek to fasten upon plaintiff constructive knowledge that it was

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to receive a reduced rate. As pithily put by Judge Goode, on the appeal in the St. Louis Court of Appeals, 101 Mo. App., loc. cit. 455, 74 S. W. 492: "Their argument runs in this wise: The contract showed on its face a limitation of defendant's liability, which the plaintiff is presumed to have known. In consideration of this limitation a smaller freight charge was always made in accordance with a tariff of rates which had been fixed by an association of railway companies, vised by the Interstate Commerce Commission and published in a book open to the inspection of shippers. Plaintiff is presumed to have known the different rates for freight of different classes when carried at the railway company's or the shipper's risk, because the Interstate Commerce Commission had approved them. All this is far-fetched, and to our minds still other presumptions are required to carry knowledge to the plaintiff of the rate charged by the defendant for the shipment in controversy. Plaintiff must be presumed to have known the goods were first-class freight according to the defendant's classification for interstate business and presumed also to have known the defendant would charge the tariff rate for first-class freight carried at the owner's risk and no more, and would observe its schedule. We grant that plaintiff is presumed to have known the contents of the bill of lading and is bound by them, there being no evidence of deception. *Railroad v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *McFadden v. Railroad*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *Kellerman v. Railroad*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828.

We grant that it has been decided a shipper is presumed to know the rates fixed and approved by the Interstate Commerce Commission, and whether a rate named in a bill of lading or agreed to verbally, is higher or lower than one published pursuant to the interstate commerce act. *Gerber v. Railroad*, 63 Mo. App. 145; *Wyrick v. Railroad*, 74 Mo. App. 406. And if a bill of lading without naming the rate recites that it was a reduced one, proof may be made that the rate was less than the one charged for nonrelease contracts. *Duvenick v. Railroad*, 57 Mo. App. 550. But that when no rate is fixed verbally or in writing, and no allusion is made to a reduced rate, the shipper is presumed to have known a reduced one was charged because the printed receipt contained a clause limiting the carrier's liability has never been decided in this state or to our knowledge." All of which we indorse. The attempt to get a federal question into this case by presuming a case within the interstate commerce act, and thereby give this court jurisdiction of this appeal cannot be countenanced. We will look deep enough into the case to see if there was in truth any ground upon which this appeal should have been certified to this court, and upon such examination we are of opinion that the interstate commerce act had nothing whatever to do with the case and there is no bona fide federal question involved in the appeal and this being the only possible

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ground upon which this court could entertain jurisdiction of the appeal, the appeal must be transferred to the St. Louis Court of Appeals, and it is so ordered.

BRACE, C. J., and BURGESS, VALLIANT, FOX, LAMM, and GRAVES, JJ., concur.

WABASH R. CO. v. SHARPE.

(Supreme Court of Nebraska, April 18, 1906.)

[107 N. W. Rep. 758.]

Carriers—Freight—Delivery.*—The general rule is that a common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God or the public enemy.

Same—Inexcusable Detention.†—A common carrier is responsible for injury to goods where the goods were exposed to injury by the carrier's inexcusable detention, and the carrier cannot in such case plead the act of God as a defense.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Error to District Court, Lancaster County; Cornish, Judge.

Action by Morton R. Sharpe against the Wabash Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. M. Hall and *C. C. Marley*, for plaintiff in error.

Mockett & Polk and *O. B. Polk*, for defendant in error.

DUFFIE, C. May 19, 1903, Morton R. Sharpe delivered to the Wabash Railroad Company at Lafayette, Ind., 5,400 pounds of household goods for shipment to Lincoln, Neb. The goods were shipped from Lafayette on the 21st of May, were delayed in Hannibal, Mo., 24 hours for rebilling, and were delivered to the Missouri Pacific Railway Company, a connecting carrier at Kansas City, on May 26th and held in the yards by the latter company until May 31st, where they were practically destroyed by the great flood occurring at that time. The goods finally reached Lincoln June 18th, but in such condition as to be useless. This action was brought to recover the value of said goods, and judgment went in favor of the plaintiff for \$865.80, from which judgment the company has taken error to this court.

*See note, 1 R. R. R. 10, 24 Am. & Eng. R. Cas., N. S., 10 (carriers of passengers and of goods distinguished); foot-notes appended to *Louisville & N. R. Co. v. Smitha* (Ala.), 19 R. R. R. 775, 42 Am. & Eng. R. Cas., N. S., 775.

†See foot-notes appended to *Alabama Great So. R. Co. v. Quarles & Couturie* (Ala.), 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69; *Mauldin v. Seaboard Air Line Ry.* (S. Car.), 19 R. R. R. 76, 42 Am. & Eng. R. Cas., N. S., 76; *General Fire Ext. Co. v. Carolina & N. W. Ry. Co.* (N. Car.), 19 R. R. R. 336, 42 Am. & Eng. R. Cas., N. S., 336.

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It is claimed by the railroad company that they shipped the goods within a reasonable time and delivered them to the connecting carrier at Kansas City in good condition. This may all be true, and still it is no answer to the plaintiff's claim. The common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, excepting only the act of God and the public enemy. The delivery of the goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a prima facie case against the carrier. It then devolves upon it to show that the loss or damage was caused by the act of God or some other cause which would exempt it from liability. It may be conceded in the present case that the flood by which the goods were practically destroyed was an act of God, which, under ordinary circumstances, would relieve the company; but we think the rule supported by the weight of authority is that a common carrier is responsible for injury to goods by act of God, if he departs from his line of duty, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God which would not otherwise have produced the injury. Or, as stated in one of the cases, a common carrier is responsible for injury to goods by act of God where the goods were exposed to injury by the carrier's inexcusable detention. Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Michaels v. N. Y. C. R. Co., 30 N. Y. 564, 86 Am. Dec. 415. In McClary v. S. C. & P. R. Co., 3 Neb. 44, 19 Am. Rep. 631, it is said: "And it is held that if the carrier wrongfully delayed the transportation of goods, and because of the delay they are injured by a flood, the carrier would be liable"—citing Lowe v. Moss, 12 Ill. 477, and Read v. Spaulding, supra.

In the absence of any showing to the contrary, it would seem that a delay of five days or more in the yards at Kansas City was an unreasonable delay, but there is evidence that the officer in charge of the United States Weather Bureau at Kansas City on May 26th, the date that these goods were delivered there, notified the public and all railroad companies of the coming flood and warned them to guard their property in the lowlands, and that this notice continued from day to day until the flood had reached its height. Under this condition of affairs, there can be no doubt of the negligence of the carrier, and that this negligence exposed the goods to the injury and damage that they afterwards suffered by the act of God. It is further claimed by the defendant company that in consideration of a reduced rate given to the plaintiff he released it from all liability in excess of \$5 per hundred pounds. Our Constitution prohibits a common carrier from limiting its common-law liability, and in C., B. & Q. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508, it was held: "A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this state, though valid in the state where made, when such attempted restriction of liability is illegal and contrary to the public policy of this state." This rule has been followed in nu-

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merous cases since and has become the settled law of this state.

The judgment in our opinion is clearly right, and we recommend its affirmance.

ALBERT and JACKSON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

WABASH RIVER TRACTION CO. v. BAKER.

(Supreme Court of Indiana, June 7, 1906.)

[78 N. E. Rep. 196.]

Carriers—Injury to Passenger—Action—Question for Jury.*—In an action against a street railroad for injuries to a passenger, held, that the question whether she was guilty of contributory negligence in descending to the lower step of the car and making ready to alight when it should come to a full stop was for the jury.

Same—Instructions.—In an action against a street railroad for injuries to a passenger, the court instructed that a higher degree of care is imposed on street railways than on steam ones, and that if plaintiff, on giving her ticket to defendant's conductor, notified him that she wished to be put off at a certain regular stopping place, it was the duty of defendant to carry plaintiff safely there, and that its duty was not discharged until it had set her down as safely as the means of conveyance and the circumstances of the case would permit. Held, while the opening statement of the instruction was not commendable, the instruction was not erroneous.

Appeal from Circuit Court, Huntington County; Jos. C. Brannan, Judge.

Action by Ethel Baker against the Wabash River Traction Company. From a judgment in favor of plaintiff, defendant appealed to the Appellate Court, from whence the case is transferred, under Burns' Ann. St. 1901, § 1337u. Affirmed.

Barrett & Morris, for appellant.

Shively & Switzer and *S. E. Cook*, for appellee.

MONTGOMERY, J. Appellee recovered a judgment for a personal injury sustained while being carried as a passenger by appellant. The only assigned error relied upon is the overruling of appellant's motion for a new trial. The grounds of the motion urged upon us are insufficiency of evidence to sustain the verdict and error of law in giving to the jury instructions numbered 2 and 4 at the request of appellee.

Appellee was returning to the city of Wabash from Boyd Park, and it was near midnight when she was hurt. The car was crowded, the seats were full, and passengers sitting in the laps of others, the aisles and vestibules were filled, and some

*For the authorities in this series on the subject of the contributory negligence of passengers in riding in dangerous places, see foot-notes appended to *Radley v. Columbia S. Ry. Co. (Ore.)*, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

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boys were on top of the car. Appellee was required to stand until, becoming tired, she removed her jacket and with it made a seat for herself upon the step leading from the rear vestibule into the car proper. She had notified the conductor that she desired to get off at "South Side," a customary stopping place in the city of Wabash. As the car approached her destination its speed was slackened until it did not exceed one mile per hour, whereupon appellee arose and descended to the lower step ready to alight when the car should come to a full stop. The power was suddenly applied, causing the car to lurch forward, throwing the standing passengers off their balance, and bunching them together, and throwing appellee against the vestibule door and out upon the ground with great violence. Appellant's counsel argue from these facts that appellee voluntarily left a place of safety, and took a perilous position upon the car, and that she is guilty of contributory negligence as a matter of law. If appellee had been furnished a customary seat within the car, this argument would impress us more favorably, but it can hardly be conceded that she was in a place safe against such perils as produced her injury, so long as she was required to stand, or to occupy an improvised seat in the doorway where she was liable to be trampled by the standing passengers of the crowded car. The lateness of the hour, and the unusual number on board would naturally suggest the desirability of dispatch in the discharge of passengers, and the slow speed at which the car was running would ordinarily induce a person already standing to believe that it was safe to move toward the place of exit, and we cannot say that, under the circumstances shown, appellee was guilty of negligence in moving down to the lower step of the car, but affirm that the question of her negligence was rightly submitted to the jury for determination. *Indianapolis, etc., R. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39; *Citizens', etc., R. Co. v. Merl*, 26 Ind. App. 284, 59 N. E. 491; *Anderson v. Citizens', etc., R. Co.*, 12 Ind. App. 194, 38 N. E. 1109; *Citizens', etc., R. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446; *Chicago City Ry. Co. v. McCaughna* (Ill.) 74 N. E. 819; *Alton Light & Traction Co. v. Oliver* (Ill.) 75 N. E. 419.

Complaint is made of the giving of instruction No. 2, which reads as follows: "The court charges you that there is a higher degree of care imposed upon street railways than upon ordinary steam railways, and if you should find in this case, by the evidence, that the plaintiff was a passenger on one of defendant's cars on the night in question, returning from Boyd Park, bound for her home in Wabash, and in giving her ticket to the conductor, notified him that she wished to be put off at the regular stopping place in said city, known as 'South Side,' it was the duty of the defendant, the street car company, to carry the plaintiff safely to said stopping place, and its duty toward the plaintiff as a carrier of passengers was not discharged or ended until they had conveyed her to the point designated, and set her down as safely as the means of conveyance employed and the

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circumstances of the case would permit, she exercising at the time, due diligence and care, and not being guilty of contributory negligence." The opening statement embodied in this instruction, that a higher degree of care is imposed upon street railways than upon ordinary steam railways, is not approved either as a proper method of defining a duty or as a correct statement of the law, although it was taken from the opinion in *Anderson v. Citizens', etc., Ry. Co.*, 12 Ind. App. 194, 197, 38 N. E. 1109. The care required of a steam railroad for its passengers is nowhere stated in the instruction, but that company is not before us, and if it were could not complain because its duty was understated. The duty of a street railway company towards passengers is defined with reasonable accuracy in the residue of this instruction. *Indianapolis, etc., Ry. Co. v. Hockett*, 159 Ind. 678, 66 N. E. 39; *Citizens', etc., Ry. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 935; *Citizens', etc., Ry. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54; *Kentucky, etc., Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338; 5 Am. & Eng. Ency. of Law, 558. Instruction No. 13 given at the request of the appellant expressly advised the jury that railway and traction companies are not insurers of the safety of their passengers; and the instruction complained of, as well as many others, admonished them that appellee could not recover unless she was without fault or negligence contributing to her injury. It is conceded that, as a carrier, appellant is required to exercise the highest degree of care to secure the safety of its passengers, and is responsible for the slightest neglect when such negligence results in injury. In review of this strict requirement, and of other instructions given, and of the conceded facts, we are clear that the objectionable part of this instruction could not have misled the jury or harmed appellant.

It is further contended that instruction No. 4 given at the request of appellee was erroneous, which instruction reads as follows: "The fact that the plaintiff undertook to alight from the car at a time when the car was still in motion does not necessarily make her guilty of contributory negligence. As to whether she could alight from the car at the time she undertook to do so with safety, is a question of fact for you, gentlemen, to determine from all the facts and circumstances in the case. If you find from the evidence, that, at the time she undertook to alight from the car, she could have done so with safety, by the exercise of due diligence and care, then she would not be guilty of contributory negligence, even though you find that the car had not come to a full stop but was still moving." We have already shown that the court could not declare, as a matter of law, upon the conceded facts of this case, that appellee was guilty of contributory negligence. What was said in the consideration of the first proposition argued, and the authorities there cited, uphold the correctness of this instruction, and it is accordingly our conclusion that no error was committed in giving the same to the jury.

No reversible error appearing in the record, the judgment is affirmed.

GARVIK *v.* BURLINGTON, C. R. & N. Ry Co.

(Supreme Court of Iowa, July 12, 1906.)

[108 N. W. Rep. 327.]

Carriers—Injuries to Passengers—Acts of Employees—Evidence—Sufficiency.—In an action against a railroad for a rape committed on a passenger by a brakeman, absence of complaint does not conclusively disprove the charge, but the jury are to consider all of the facts and circumstances surrounding and connected with the transaction, including the age, intelligence, and experience of plaintiff.

Same.—In an action against a railroad for a rape committed on a passenger by a brakeman, the evidence held sufficient to show that the rape was committed.

Same—Acts of Employees—Rape.*—A railroad is liable for a rape committed on a passenger by a brakeman.

Same—Instructions.—In an action against a railroad for a rape committed on a passenger, it was proper to refuse to submit the question of contributory negligence.

Evidence—Evidence at Former Trial—Effect.—Where testimony taken on a former trial was used by both parties, it was to be treated and considered by the jury and given the same effects as if the same witnesses had testified in open court.

Carriers—Injuries to Passenger—Instructions.—In an action against a railroad for a rape committed on a passenger by a brakeman, which resulted in pregnancy, an instruction that plaintiff was entitled to recover for time lost by reason of the wrong complained of, did not warrant an inference that damage might be awarded for time lost in caring for the child.

Damages—Excessive Damages—Injuries to Person.—In an action against a railroad for a rape committed on a passenger by a brakeman which resulted in pregnancy, plaintiff having testified to conditions existing since the injury strongly indicating that her mental anguish on account of the outrage was neither great nor lasting, a verdict for \$8,000 was excessive by \$5,000.

Appeal from District Court, Linn County; J. H. Preston, Judge.

Suit by a passenger to recover damages for an assault alleged to have been committed by one of the defendant's trainmen. Trial to a jury and verdict and judgment for the plaintiff. The defendant appeals. Affirmed on condition that plaintiff remit a portion of the judgment.

Carroll Wright and *J. L. Parish*, for appellant.

B. L. Wick, Crosby & Fordyce, and *Lewis Heins*, for appellee.

SHERWIN, J. The act for which recovery is sought is alleged to have been committed on one of the defendant's trains on the 9th of October, 1899. The controlling facts on which the suit is based are substantially and briefly as follows: The plaintiff is a native of Norway, where she lived until the fall of 1899. Her father and an uncle came to Iowa prior to that time, and in May,

*For the authorities in this series on the subject of the duty of a carrier to protect its passengers from assaults by its employees, see foot-notes appended to *Illinois Cent. R. Co. v. Winslow* (Ky.), 14 R. R. R. 432, 37 Am. & Eng. R. Cas., N. S., 432.

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1899, the uncle went to Norway, returning to this country in the early days of October, accompanied by the plaintiff, her mother, and a brother and sister; the latter 12 years of age. The plaintiff was then 23 years old. When the party left Cedar Rapids on the defendant's train, the plaintiff, her mother, and sister occupied seats together in one coach, and the uncle and her brother were in another coach of the same train. Their destination was Larchwood, Iowa. The train left Cedar Rapids about midnight, and the evidence tends to show that, during the remainder of the night, Dye, the brakeman charged with the act, was very attentive and pleasant to the plaintiff and her sister, several times stopping to chat with them, although they could understand nothing that he said. About 6 o'clock in the morning, while it was yet dark, the plaintiff went to a toilet room in the rear end of the car, and she claims that, immediately after she entered it and closed the door, Dye opened the door, went in, and shut and bolted the door, and that he then by putting her in great fear, and by preventing her attempted outcry, had sexual intercourse with her. After the consummation of the act, Dye left the toilet room at once, and in a very few minutes thereafter the plaintiff returned to her seat in the car. She made no complaint to any one, and neither her mother or her father knew of the transaction until about two months thereafter, when their family physician discovered that she was enceinte, and so informed them. She says, however, that at about that time she told her sister what had happened on the train. She gave birth to a child on the 28th of June, 1900.

In this connection we may as well dispose of the appellant's contention that the verdict is not supported by sufficient evidence. It may well be conceded that the case made by the plaintiff's own testimony presents some rather unusual features; but, notwithstanding this concession, if it be true that sexual intercourse was accomplished by putting her in fear and by preventing an outcry while it was being attempted and consummated, she should recover. While the ordinary female who has been ravished will make the fact known to her family or friends at the very earliest possible moment, complaint is not always made, and we have repeatedly held that conviction, in criminal cases charging rape, is proper though no complaint be made. In other words, absence of complaint is not conclusive, but the jury are to consider all of the facts and circumstances surrounding and connected with the transaction, including the age, intelligence, and experience of the injured party. *State v. Cross*, 12 Iowa, 66, 79 Am. Dec. 519.

In addition to denial of the alleged transaction in the toilet room, Dye testified that, owing to an injury to his penis received in 1881, he had never since that time had an erection or been able to have sexual intercourse. His wife also testified to the same effect. This testimony was not conclusive, however. Dye would, of course, shield himself as far as possible, and the jury was not

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bound to believe the wife rather than the plaintiff. The smiles and the attention bestowed on the plaintiff and her sister by Dye during the night journey north from Cedar Rapids are not indicative of copulative incapacity, and we are not greatly surprised that the jury did not fully credit the testimony he offered on the subject. The question was for the jury, and the verdict, as to the commission of the act by Dye, is sufficiently supported by the evidence. The appellant urges that its request for a directed verdict should have been granted because the cause of action set out in the petition could not be maintained against it. It is conceded by appellant that, if Dye made an assault upon the plaintiff while she was a passenger on its train, a cause of action would arise for a breach of the implied duty to furnish her protection during such time; but it is said that the basis of her claim is that the defendant, through its agent, committed a criminal assault upon her. It is true the petition alleges an assault amounting to rape, but at the same time it makes other allegations presenting a cause of action concededly maintainable. It alleges that the plaintiff was a passenger on the defendant's train, and that, while it was transporting her, one of its servants or agents committed the act complained of. It is shown without question that Dye was one of the appellant's servants engaged in the operation of the train in question, and, if he committed the assault complained of, the appellant is liable to respond therefor because of its duty to its passengers. 3 Thompson on Negligence, § 3184; 2 Shearman & Redfield on Negligence, § 513, and cases cited; *Garvik v. Railway Co.*, 124 Iowa, 691, 100 N. W. 498, the first appeal in this case; *McKinley v. Railroad Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Johnson v. C. R. I. & P. R. Co.*, 58 Iowa, 348, 12 N. W. 329; *Lewis v. Schultz*, 98 Iowa, 341, 67 N. W. 266; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 222, 2 Am. Rep. 39.

It is further said that there was error in not submitting to the jury the question of the plaintiff's contributory negligence. No such instruction was necessary under the rule announced in *Bryan v. C. R. I. & P. Ry. Co.*, 63 Iowa, 464, 19 N. W. 295. But, were the rule otherwise, there was no conflict in the testimony as to what took place between the plaintiff and Dye in the toilet room, and, if they were there together, the evidence conclusively shows that the plaintiff did nothing to contribute to her injury. Just what acts on the part of the plaintiff would amount to contributory negligence in a case of this nature are not pointed out. The court instructed that, if she consented to the intercourse, she could not recover, and it is quite evident that whatever she may have failed to do after the wrong was committed was immaterial.

Instructions 4 and 5 are criticised, but we think unjustly so. The fourth told the jury that it was the duty of the defendant to exercise the highest degree of care towards the plaintiff while she was a passenger on its train, and that, if she was assaulted by one of the appellant's servants during said time, it was liable for such assault. The instruction is in line with the rule of law

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governing the case, and, unless we indulge in undue technicality as to the issue presented by the petition, no fault can be found therewith. Testimony taken on other trials of the case was used by both sides, and the court instructed that it was to be treated and considered by the jury and given the same effect as if the same witnesses had testified in open court. There was no error in so instructing. It is contended that the court's statement of the issues, in connection with its eighth instruction, authorized the jury to award damages for time lost in caring for the child. The statement of the issues did not fairly imply that the plaintiff was asking such damage, and the instruction told the jury only that it might award damages for the loss of time sustained by reason of Dye's conduct. There is no merit in the complaint.

The verdict and judgment were for \$8,000, and it is urged that the verdict is so excessive as to indicate passion and prejudice on the part of the jury. Considering the entire record before us, we are agreed that the recovery is excessive; but we agree further that the amount found by the jury does not necessarily indicate improper influence. There is some evidence tending to show physical disability on account of the birth of the child, and testimony tending to show some mental pain and suffering. On the other hand, the plaintiff herself testified to conditions existing since the injury, strongly indicating that her mental anguish on account of the outrage was neither great nor lasting. Indeed, her failure to make it known until her condition, the result of the intercourse, was discovered, negatives the thought of great indignation and mental suffering. The jury may have acted in perfect good faith in finding that the assault was made by Dye as claimed, and still not have analyzed, as carefully as we have tried to do, the evidence as to the damage suffered on account thereof. The judgment should be reduced to \$3,000. If the plaintiff shall elect, in a writing filed with the clerk of this court within 30 days, to accept such sum in full satisfaction of her claim for damage against the defendant, the case will stand affirmed; otherwise it will be reversed.

Affirmed on condition.

TIMLER v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania, March 19, 1906.)

[63 Atl. Rep. 824.]

Street Railroads—Collision with Wagon—Contributory Negligence.*—A driver of a team is guilty of contributory negligence where he fails to look before going on street railway tracks at the intersection of two streets.

Mestrezat and Potter, JJ., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Herman Timler against the Philadelphia Rapid Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Samuel E. Cavin and Frederick Beyer, for appellant.

Thomas Leaming and Russell Duane, for appellee.

ELKIN, J. The undisputed evidence is that when appellant looked the second and last time the head of his horse was 9 feet from the track, while he himself was seated on his wagon nearly 20 feet distant. When he last looked and saw the approaching car, it was necessary, in order to cross in safety, that he should drive 9 feet to the track, 5 feet across it, which, added to the length of his horse and wagon, 18 feet, made a total of 32 feet, before he could pass the car in safety. Notwithstanding these facts, he disregarded his duty to look immediately before going upon the track, and was injured by the collision with the car. Under the settled rule of our cases he was guilty of contributory negligence, and there can be no recovery. This court has frequently said that when the driver of a team, at the intersection

*For the authorities in this series on the question whether the stop, look, and listen rule is applicable to street railway crossings, see foot-notes appended to *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; *Giardina v. St. Louis & M. R. Ry. Co. (Mo.)*, 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579; foot-notes appended to *Vrooman v. North Jersey St. Ry. Co. (N. J.)*, 15 R. R. R. 393, 38 Am. & Eng. R. Cas., N. S., 393; *Markowitz v. Metropolitan St. Ry. Co. (Mo.)*, 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; foot-notes appended to *Los Angeles Traction Co. v. Conneally (C. C. A.)*, 16 R. R. R. 107, 39 Am. & Eng. R. Cas., N. S., 107.

For the authorities in this series on the subject of the care required of those driving other vehicles on streets upon which street cars are operated, see foot-notes appended to *Ablard v. Detroit United Ry. (Mich.)*, 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722; *McCarthy v. Boston Elev. Ry. Co. (Mass.)*, 17 R. R. R. 856, 40 Am. & Eng. R. Cas., N. S., 856; *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; *Riley v. Shreveport Traction Co. (La.)*, 16 R. R. R. 785, 39 Am. & Eng. R. Cas., N. S., 785; foot-notes appended to *Wood v. Boston Elev. Ry. Co. (Mass.)*, 16 R. R. R. 475, 39 Am. & Eng. R. Cas., N. S., 475.

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of two city streets, fails to look immediately before going upon the track, he is guilty of contributory negligence. *Ehrisman v. Passenger Railway Co.*, 150 Pa. 180, 24 Atl. 596, 17 L. R. A. 448; *Darwood v. Union Traction Co.*, 189 Pa. 592, 42 Atl. 290; *Kern v. Second Avenue Traction Co.*, 194 Pa. 75, 45 Atl. 125; *Burke v. Union Traction Company*, 198 Pa. 497, 48 Atl. 470; *Pieper v. Union Traction Company*, 202 Pa. 100, 51 Atl. 739; *Keenan v. Union Traction Company*, 202 Pa. 107, 51 Atl. 742, 58 L. R. A. 217; *Moser v. Union Traction Company*, 205 Pa. 481, 55 Atl. 15; *Boring v. Union Traction Company*, 211 Pa. 594, 61 Atl. 77.

The case at bar cannot be distinguished from the cases cited. Indeed, the facts in many of the cited cases more strongly favored the plaintiff than do those of the present case. The appellant looked twice and saw the car rapidly approaching. He first saw it a little more than 300 feet away. He drove on about 10 feet and saw the car a little more than 200 feet distant. In other words, while he drove 10 feet the car moved about 100 feet. At the time he last looked it was necessary for him to travel 32 feet to clear the tracks, while the car would have to move about 200 feet before reaching him. It is clear, therefore, that if he drove at the same rate of speed and the car continued to move at the same rate, a collision must result. Notwithstanding these facts he continued on without again looking for the car which he knew was rapidly approaching. If he had looked immediately before going upon the track, as the rule of our cases requires, he would have seen the car less than 100 feet away, and should have known that he could not cross in safety if he continued driving at the same rate of speed. The evidence shows that he took no precaution for his safety after he looked the second time. The rule of law which requires him to look immediately before going on the track is not complied with if when he looks and sees danger he makes no effort to avoid it. Even if it be conceded that the car was running at an unusual rate of speed, appellant was not thereby excused from the performance of duties imposed on him by law. If he had observed his duty to look immediately before going on the track, the question of defendant's negligence in running the car at an excessive rate of speed might have been properly submitted to the jury. He did not do so, and the case turns not on the defendant's negligence, but on the contributory negligence, of plaintiff. Indeed, the greater the danger from the rapidly approaching car, the more imperative his duty to look immediately before going on the track. It was not only his duty to look at the proper place, but when he looked and saw danger, which could be avoided by the exercise of reasonable care, it was his duty to avoid that danger. We have frequently said that it is as much the duty of the driver of a team to avoid a collision in these cases as it is of the motorman of a car. The learned court below gave binding instructions for defendant, and in this we see no error.

Judgment affirmed.

GREEN *et al.* v. BALTIMORE & O. R. Co.

(Supreme Court of Pennsylvania, March 5, 1906.)

[63 Atl. Rep. 603.]

Carriers—Injury in Station—Liabilities.—In an action by a passenger against a railroad company for injuries from a fall over a cuspidor on the floor of the railroad station, judgment held properly entered, under the evidence, for defendant.

Same—End of Relationship.*—Where a woman who had been a passenger left the train, and in passing through the depot fell over a cuspidor on the floor and was injured, she had ceased to be a passenger, and the burden was on her to show affirmatively negligence on the part of defendant.

Appeal from Court of Common Pleas, Philadelphia County.

Action by John S. Green and Buelah May Green against the Baltimore & Ohio Railroad Company. Verdict for plaintiffs. From a judgment for defendant notwithstanding the verdict, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. C. Stillwell and *Charles Steen*, for appellants.

G. H. Stein and *W. B. Linn*, for appellee.

FELL, J. Buelah M. Green, one of the plaintiffs, was injured by falling in the defendant's station. She and her husband had been passengers on the defendant's train and arrived in Philadelphia at midnight. They walked from the trainshed to the waiting room of the station and then proceeded along the central passageway in the direction indicated by a sign board towards steps which led to the street. The station was large and well lighted. The passageway was 35 feet in length and 8 or 10 feet in width, and on either side of it there was a row of seats facing inward. It does not appear that there were any passengers ahead of the plaintiffs, and they had a clear view of the passageway and of the steps. After walking 10 or 12 feet in the station Mrs. Green, who was carrying a child in her arms, fell over a large cuspidor which she had not seen. She testified that she was walking 3 feet away from the row of seats, and struck something and fell over it. Her husband testified that after he had helped her up he saw the cuspidor. A station master was standing some distance from them, and two porters were in the room; one engaged in cleaning the steps with a brush and the other looking out the door. At the trial the defendant offered no evidence and asked for binding instructions in its favor, which were refused.

*For the authorities in this series on the question, who are, and are not passengers, see foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

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The questions of the defendant's negligence, and of the plaintiff's contributory negligence were submitted to the jury, whose finding was against the defendant. The court reserved the question whether there was any evidence in the case that entitled the plaintiffs to recover, and entered judgment for the defendant non obstante veredicto, for the reason that the undisputed facts established did not warrant the inference that the defendant's employees either placed the cuspidor in the passageway or knew, or by proper inspection might have known, that it was there. The reason is thus more fully stated in the opinion filed by the learned trial judge: "Neither of the plaintiffs, nor any of their witnesses saw the cuspidor in the aisle until after the accident; so how can we justifiably draw the inference that the company's employees must have, should have, or could have seen it in time to have prevented the accident? For the jury to say that the defendant should have known that the cuspidor was in the place where it was found after the accident, without any other facts to justify this other than the fact that it was so found, would be to allow a mere arbitrary finding without facts on which to base it, unless we are prepared to rule as a matter of law that it is the duty of the railroad company to so police its station that it will always and at all times and under all circumstances see that its aisles are properly clear of all obstructions that might possibly cause accidents, and this would be practically to hold railroad companies to be insurers of the safety of passengers, which under the authorities we cannot do."

At the time of her injury Mrs. Green was not a passenger. She had left the train, passed from the trainshed to the passenger station and had selected one of several passageways leading to the street. The relation of passenger and carrier had ended, and the burden of affirmative proof of negligence was upon her. *Railroad Co. v. Napheys*, 90 Pa. 135; *Hayman v. Railroad Co.*, 118 Pa. 508, 11 Atl. 815; *Bernhardt v. Railroad Co.*, 159 Pa. 360, 28 Atl. 140. The only proof was that a cuspidor, similar to those in general use in public places, was standing in a passageway three feet from a row of seats. By whom it had been placed there or how long it had been there were not shown, nor was any fact shown by which knowledge of its position could be imputed to an employee of the defendant. The plaintiff's case rested solely upon constructive notice. But the full measure of the defendant's duty was reasonable care by inspection and policing to keep its station in a safe condition. To hold that the mere proof of an injury caused by the misplacement of a loose piece of furniture in the waiting room of a station gives rise to a presumption of negligence that shifts the burden of proof would be an unwarrantable extension of the rule applicable only to a passenger seated in a railroad car who is injured through the means of transportation.

The judgment is affirmed.

WALDAUER v. VICKSBURG RY. & LIGHT CO.

(Supreme Court of Mississippi, May 7, 1906.)

[40 So. Rep. 751.]

Carriers—Ejection of Passenger—Violation of Law Requiring Separation of Races—Evidence—Admissibility.—In an action against a street railroad company for ejecting a passenger and causing him to be arrested for violation of Laws 1904, p. 140, c. 99, relating to the division of cars into separate compartments for the white and colored races, where the only evidence of a division of the inside of a car between the two races consisted of proof of an established custom, testimony to establish a custom of the company to permit passengers of both races to occupy the back platform of its cars was admissible.

Same—Defense—Compliance with Law by Carrier—Street Railroads.*—To justify a street railroad company in causing the arrest and ejection from its cars of a passenger for a violation of Laws 1904, p. 140, c. 99, providing that street railways shall provide separate accommodations for the white and colored races by providing two or more cars, or by dividing the cars by a partition or adjustable screen, the company itself must have complied with the provisions of the law.

Same.*—The posting of a sign in a street car indicating that a part of the car was to be used by white persons and another part by colored persons was not a sufficient compliance with Laws 1904, p. 140, c. 99, providing that street railways shall provide separate accommodations for the white and colored races by providing two or more cars, or by dividing the cars by a partition or adjustable screen, especially where the sign posted was not large enough to be seen in all parts of the car.

Appeal from Circuit Court, Warren County; O. W. Catchings, Judge.

Action by Joseph Waldauer against the Vicksburg Railway & Light Company for damages alleged to have been caused by the wrongful arrest and ejection of the plaintiff from the car of the defendant. The court gave a peremptory instruction to find for the defendant, and plaintiff appeals. Reversed and remanded.

The evidence shows that plaintiff boarded an open or summer car operated by the defendant and stood on the rear platform; that the conductor requested him to move to the front part of the car, stating that he was violating the "Jim Crow" law, providing that street railways shall provide "separate accommodations for the white and colored races by providing two or more cars or by dividing the cars by a partition or adjustable screen, * * * so as to secure separate accommodation for the white and colored races." Laws 1904, p. 140, c. 99. The car was well filled, and there were a number of ladies in the front part of the car. A

*For the authorities in this series on the subject of the duty to separate white and colored passengers, see foot-note appended to Southern L. & T. Co. v. Compton (Miss.), 18 R. R. R. 269, 41 Am. & Eng. R. Cas., N. S., 269; Choctaw, etc., R. Co. v. State (Ark.), 16 R. R. R. 544, 39 Am. & Eng. R. Cas., N. S., 544; Commonwealth v. Louisville & N. R. Co. (Ky.), 16 R. R. R. 91, 39 Am. & Eng. R. Cas., N. S., 91.

negro was seated on the rear end platform. The plaintiff told the conductor he did not care to sit down or go inside; that he preferred to stand on the rear platform, as he was using tobacco. The conductor called the attention of the plaintiff to a sign suspended in the car, indicating that the front part of the car was for white passengers and the rear for colored passengers. The conductor collected plaintiff's fare and insisted that he go inside to the front of the car. Plaintiff refused to do so, and the conductor stopped the car, got a policeman, and had him arrested for violating the "Jim Crow" law. Plaintiff brought suit, and on the trial offered to prove that it was the custom of the railroad company to allow passengers on the rear platform regardless of race. The court excluded the testimony, and gave a peremptory instruction for the defendant.

N. Vick Robbins, for appellant.

Smith, Hirsh & Landau, for appellee.

TRULY, J. It was error to refuse to admit testimony to establish that it was the custom of the appellee to permit passengers of both races to occupy the back platforms of its street cars. So far as the proof discloses, it was only by an established custom that even the inside of the cars was divided between the two races. The proof of this custom was elicited by an inquiry of the trial judge propounded to the appellant, and to which interrogatory the reply was made that "the rear seats are reserved inside of the car for negroes, and for the white people the front seats, has been the custom." Similar testimony to establish the custom in reference to the use of the platform was immediately thereafter excluded. This was clearly erroneous.

The appellee caused the public arrest and ejection from its cars of the appellant for an alleged violation of the "Jim Crow" law. Acts 1904, p. 140, c. 99. But that law does not deal with platforms at all. It deals with the cars in which passengers generally ride. Its provisions are confined in their operation to "cars and compartments," and requires the divisions of cars into compartments for the accommodation and separation of the races. In order to justify a street car company in directing the arrest of a passenger for a violation of this law, it must be manifest that the company has itself faithfully carried its provisions into effect. The law was enacted in pursuance of a wise public policy, and its mandate is obligatory on all street car companies. But in the instant case it does not appear that the appellee has complied with its requirements. The contrary fact is plainly deducible from the entire testimony in this record. It is very apparent from this record that this street car company, as in *Traction Co. v. Compton*, 86 Miss. 269, 38 South. 629, has resorted to the subterfuge of putting up "signs," instead of providing screens or partitions, as required by the express terms and manifest intent of the statute. We again condemn as unavailing this attempt to evade the law. The testimony discloses that the sign intended to operate as a separation of the seats to

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be occupied by the two races was not visible from the platform where appellant stood. Assuredly, a sign so small as not to be visible from any portion of the car cannot be magnified into a partition or screen dividing a car into separate compartments.

It was error to take this case from the jury. The appellee must first comply with the law before its protection can be invoked to avoid liability for an otherwise tortious act. If the appellee, while itself willfully violating or ignoring the law, still attempts to punish a passenger for refusing to obey the same law, and wrongfully ejects him from the car because of such refusal, the wronged passenger would be entitled to such damages as the jury, under the circumstances attendant upon the expulsion and arrest, might feel justified in awarding.

Reversed and remanded.

HAMILTON v. LOUISIANA & N. W. R. Co. et al.

(Supreme Court of Louisiana, June 18, 1906. Rehearing Denied June 26, 1906.)

[41 So. Rep. 560.]

Railroads—Defective Track—Liabilities.*—Where a railroad company granted to a lumber company the privilege of running a logging train on its roadway, and the train was derailed and the conductor injured by the giving way of a defective bridge, the railroad company is liable in damages.

Master and Servant—Injury to Servant.—In such a case, the lumber company, not guilty of any default or negligence, and with no supervision or control over the track or knowledge of its condition, is not liable for the injuries sustained by its conductor, who had full knowledge of the situation when he accepted the employment.

(Syllabus by the Court.)

Appeal from Third Judicial District Court, Parish of Claiborne; James Edward Moore, Judge.

Action by Thomas P. Hamilton against the Louisiana & Northwestern Railroad Company and Athens Lumber Company. Judgment for plaintiff, and defendants appeal. Reversed and dismissed as to lumber company, and, as thus amended, affirmed.

John A. Richardson, for appellant Louisiana & N. W. R. Co.
Enos Howard McClendon, for appellant Athens Lumber Co.
John C. Theus, for appellee.

LAND, J. This is a suit for damages for personal injuries alleged to have been occasioned by the wreck of a log train in charge of plaintiff as conductor, by reason of the giving way of defective bridge on defendant's line.

*See foot-note appended to *Chicago & G. T. Ry. Co. v. Hart* (Ill.), 13 R. R. R. 579, 36 Am. & Eng. R. Cas., N. S., 579; foot-notes appended to *Chicago Term. Transfer R. Co. v. Vandenburg* (Ind.), 17 R. R. R. 740, 40 Am. & Eng. R. Cas., N. S., 740.

Plaintiff was employed by the lumber company, which was operating a log train on defendant's track under the terms of a written contract between the parties defendant.

There was a verdict and judgment in favor of the plaintiff for \$6,000 against the defendants, in solido, and they have appealed. The fight is a triangular controversy; each defendant contending that, if plaintiff is entitled to recover anything, the other is liable.

Plaintiff alleges that on or about June 26, 1905, he was in the employ of the Athens Lumber Company, as conductor of a log train which was being operated over the line of the defendant railroad company, under a contract, the terms and conditions of which were unknown to the petitioner at the time.

The petition further alleges that, on said date, while said train was being properly operated, it was derailed by the giving way of a rotten and defective bridge, and petitioner was thrown violently to the ground and his right arm was crushed, and was amputated a few hours later.

The petition charges that it was the legal duty of said railroad to keep its tracks and bridges in sound and safe condition, and that the same duty devolved upon the lumber company as far as its employees were concerned, and that their failure to perform such duty caused the injury complained of.

In February, 1905, the defendants entered into a written contract by virtue of which the lumber company acquired the right to operate a locomotive on the railroad track for the purpose of hauling logs from such points on the line as the lumber company might desire to its mill at or near Athens, on certain specific conditions.

It was stipulated that the engineer and conductors employed should be approved by the railroad company, and discharged at its request; that the locomotive should not come upon the track of the railroad company, either with or without its train, without the authority of its train master; and that the engineer or conductor should report by telephone the movements of the log train to said official from the time of going on the line to the time of leaving it and locking the switches.

It was further stipulated as follows, to wit:

"The party of the second part (the lumber company) is to be responsible for all damages that may occur in consequence of its operating its locomotive or train on the line of the party of the first part (the railroad company), except as hereinafter provided.

"The party of the second part will be responsible for all personal injuries to its own employees, to the employees of the party of the first part or to outside persons, which may result from the operation of its locomotive or train, and which may become a liability on the party of the first part.

"The same conditions apply in regard to loss of stock or from fire resulting from the use of its engine, also for all damages to track or the rolling stock of the party of the first part from

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any accident, wreck, or collision on the track. But, when the locomotive or train of the party of the second part is out with the authority of the train master of the party of the first part, and any collision occurs, then the question of responsibility will be a question of which party is in fault."

It was further stipulated that the lumber company should make a satisfactory bond for the performance of the conditions of the contract and to indemnify the railroad company "for any loss or damage occurring through the nonobservance of it."

It was further stipulated that no persons were to be allowed on the log train except employees actually on duty, and that the lumber company should have the privilege of transporting feed and supplies for necessary teams and camps.

It was further stipulated that the object of granting the concession to run a locomotive and train on the railroad track was to enable the lumber company to haul logs from points on the main line, wherever they might be purchased, and that certain rates according to distance should be paid by the lumber company for the use of the line for hauling logs.

The contract was made for the term of 10 years, and contains other stipulations which need not be recited. The railroad company filed an exception of no cause of action and a motion for a severance, both of which were overruled.

The railroad company then answered, pleading the general issue, but admitting that plaintiff was injured while working as a conductor on a log train belonging to or being run by the Athens Lumber Company on the respondent's track, being at the time in the employ of said lumber company.

Respondent specially denied that it had any control over said log train or the conductor thereof, and averred that it was not responsible, by contract or otherwise, for the injury complained of by the plaintiff.

Respondent pleaded in the alternative that plaintiff was an expert railroad man, both as to train service and tracks, bridges, etc., and, in accepting employment under the lumber company, assumed all the risks necessarily attending that position of which he was aware or could have known by proper care and prudence.

Respondent finally pleaded contributory negligence, without specifying any particular faults of which plaintiff had been guilty.

The lumber company answered and admitted the injury as alleged in the petition, but averred that, under the contract referred to therein, it was not responsible to the knowledge of plaintiff, for damages occasioned by the defective bridge, and in the alternative charged that the injury complained of was the result of plaintiff's own negligence. The proximate cause of the accident was the giving way of the railroad bridge.

A number of witnesses for plaintiff testified that some of the timbers were rotten. The same fact is testified by witness for the railroad company.

A civil engineer was sent by said company to the scene of the

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accident, and he made no examination of the structure. There **i**s no assignable reason for the giving way of bridge, save the **d**ecay of the timber.

The evidence is conflicting as to the speed of the train at the **t**ime and as to the weight of the car loads of logs.

All the men on the train testify that there was nothing **u**nusual either in the speed or in the loading.

The rotten bridge accounts for the accident, and the evidence **d**id not satisfy the jury and does not satisfy us that the accident would not have happened if the speed had been less or the load lighter. The objection that the conductor was riding on a loaded car and not on the locomotive is without merit.

Where a railroad bridge collapses, the burden of proof is on the company to show the highest degree of practical care and skill in the construction of the bridge and its inspection from time to time to discover defects. *Jackson v. Railway Co.*, 114 La. 981, 38 South. 701.

This burden has not even been attempted to be discharged in this case beyond the vague testimony of a foreman of a section gang that he looked at the structure and it seemed all right.

The question in the case is as to the legal liability of the defendants, or either of them, for the injuries suffered by the plaintiff.

As to the railroad company, the plaintiff was neither a passenger nor an employee, but was lawfully on the train as an employee of the Athens Lumber Company, which had a contractual right to the use of the track.

The authorities make a distinction between the case where a lease of a railroad is authorized by statute and the case where it is not.

In the former, the lessor is not responsible for injuries resulting from the negligent operation of the leased line by the lessee company, but, where the injury results from the omission of some duty which the lessor owes to the public, its responsibility cannot be shifted by leasing its tracks to another company.

Where a lease is not authorized by statute, the corporation to which the franchise was granted is liable for all injuries resulting from the negligent operation of the road by its lessee, as well as from its omission of some duty owing to the public. See *Caruthers v. Railroad Co.*, 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737, and notes.

The same principles apply to "running privileges or arrangements." *Id.*, notes 44 L. R. A. 750-752.

In *Muntz v. Railroad Co.*, 111 La. 423, 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495, this court held that a railroad corporation is liable for injuries to persons caused by the wrongful or negligent operation of the cars upon the road, whether operated by itself or another corporation to which it has leased the franchise.

We see no possible escape from the conclusion that the defendant railroad company is liable to plaintiff for its failure to dis-

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charge the public duty of maintaining safe bridges on its line. The fact that the plaintiff was the employee of the lessee company makes no difference. *Caruthers' Case*, supra, page 753, of 44 L. R. A. note 7.

The lumber company, under its "running contract," did not undertake to keep the track and bridges of the railroad company in good condition, nor did it assume liability for damages resulting from the faults of the railroad company.

The lumber company employed the plaintiff to operate a train over the railroad track of its grantors. Plaintiff knew that his employer had no control or supervision over the bridges of the railroad company, and had no means of knowing their conditions save through the observation and reports of plaintiff and his fellow employees.

The lumber company was guilty of no negligence of fault in the premises. Plaintiff was aware of the situation and accepted the employment, relying on the railroad company to furnish and maintain a safe track, and well knowing that it was not incumbent on the lumber company to inspect or repair bridges or roadbed.

The lumber company did not undertake to furnish the track or keep it in safe condition.

We therefore are of opinion that the verdict and judgment against the lumber company should be reversed.

The verdict is not assailed as excessive in amount.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, in so far as it is against the Athens Lumber Company, and it is further ordered and decreed that plaintiff's suit and demand against said company be dismissed with costs, and that as thus amended the judgment appealed from be affirmed; costs of appeal incurred by the Athens Lumber Company to be paid by the plaintiff and the remainder by the defendant railroad company.

FOWLES v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Feb. 26, 1906.)

[53 S. E. Rep. 534.]

Railroads—Killing Dog on Track.*—There is no presumption of negligence of a railroad from the fact of the killing of a dog on the track.

Same—Signals at Crossing.*—An engineer is not required to give statutory signals at crossings to warn a dog hunting near the track, but must take precautions to avoid injuring the dog, if seen on the track, and not in the possession of its faculties.

*For the authorities in this series on the subject of the care due from trainmen to avoid running over dogs, see *Moore v. Charlotte E. Ry. L. & P. Co. (N. Car.)*, 14 R. R. R. 135, 37 Am. & Eng. R. Cas., N. S., 135.

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Appeal from Common Pleas Circuit Court of Richland County ;
Gary, Judge.

Action by J. J. Fowles against the Seaboard Air Line Railway.
From a judgment affirming a judgment of magistrate, defendant
appeals. Reversed.

Lyles & McMahan, for appellant.

Jas. H. Fowles, Jr., for respondent.

WOODS, J. The plaintiff recovered judgment in the court of Magistrate Robert Moorman for \$75, the alleged value of a Red Bone fox hound killed by the defendant's train of cars. The judgment of the circuit court affirming the judgment of the magistrate must be reversed on the ground that there was no evidence of negligence. The proof was that the dog was killed by the train while trailing around the track near the public crossing. The act of the defendant alleged to be negligent and on which, as stated by the magistrate, the judgment was based, was that the defendant's train "gave no warning such as is usually given when animals are on the track, and that this was negligence inasmuch as the engineman had ample time to see the dog ahead of him." No witness saw the dog when he was killed, and there is nothing to indicate whether he was on the track long enough for the engineman to see him and sound the whistle, or ran on the track the instant he was killed. The person who had him in charge, and who knew of the approach of the train had no right to rely upon the statutory signals required at a crossing, as the dog was not in the attitude of one intending to cross, but merely happened to be hunting near by. *Neely v. Railroad Co.*, 33 S. C. 136, 11 S. E. 636; *Kinard v. Railroad Co.*, 39 S. C. 514, 18 S. E. 119; *Sims v. Railway Co.*, 59 S. C. 246, 37 S. E. 836. The rule in *Danner's Case*, 4 Rich. Law, 329, 55 Am. Dec. 678, does not apply to the killing of a dog by a railroad train and there is no presumption of negligence from the fact of killing. *Wilson v. Railroad Co.*, 10 Rich. Law, 52; *Richardson v. Railroad Co.*, 55 S. C. 334, 33 S. E. 466. The dog's intelligence, the rapidity and agility with which he moves, warrant those in charge of a train in acting upon the supposition that he will observe its approach, and get out of its way. In this respect it is reasonable to place him on somewhat the same footing as a human being when in the possession of all his faculties and capable of seeing the danger and escaping from it. If the dog had been observed by the engineman to be on the track in a condition of helplessness or even impaired capacity to take care of itself, it would have been the duty of the engineman to take some precaution for its safety; but there is no proof that the dog was not in possession of his faculties, or that the engineman had any opportunity to see him on the track before he was killed.

The judgment of this court is that the judgment of the circuit court be reversed.

CHICAGO & E. I. R. Co. *v.* CROSE.

(Supreme Court of Illinois, Feb. 21, 1905.)

[73 N. E. Rep. 865.]

Accident on Track—Speed in Violation of Ordinance—Presumption of Negligence.*—Under the express provisions of Hurd's Rev. St. 1903, c. 114, § 87, when a railroad corporation runs a train through a village at a speed in excess of that permitted by an ordinance thereof, any injury done by the train is presumably due to the negligence of the corporation.

Same—Same—Same—Rebuttal.—The presumption created by the statute is a rebuttable one.

Question for Jury.—In an action against a railroad company for the killing of a team of horses, held, that the question whether defendant's evidence was sufficient to overcome the presumption of negligence arising under Hurd's Rev. St. 1903, c. 114, § 87, owing to speed in excess of that permitted by an ordinance, was one for the jury.

Appeal—Review.—Whether a verdict is supported by the weight of the evidence cannot be considered on appeal from a judgment of the Appellate Court affirming a judgment below.

Collision with Teams—Contributory Negligence—Question for Jury.—In an action against a railroad company for the killing of a team of horses, which became frightened at a passing train, evidence considered, and held, that the question whether plaintiff was guilty of contributory negligence was one for the jury.

Same—Evidence—Photographs.†—In an action against a railroad company for the killing of a team of horses, photographs of the scene of the accident, offered in evidence for the purpose of contradicting plaintiff's testimony, that his view was so obstructed that he could not see the approach of the train, were inadmissible; it not being clearly shown that the arrangement of cars and other obstructions at the place in question were the same as at the time of the accident.

Harmless Error.—Where the exclusion of testimony could not have harmed appellant, it is not reversible error.

Cross-Examination.—Where, on the cross-examination of a witness, counsel read to him from a paper a question put to him before a magistrate and his answer thereto, to contradict his testimony on the trial, and he admitted that he made the statement, and the magistrate testified that he asked the question, and that the witness answered it as set forth in the paper, the party cross-examining the witness was not prejudiced by a refusal to admit the paper in evidence.

Collision with Teams—Evidence—Experiments.‡—In an action against a railroad company for the killing of a team of horses, plaintiff claimed that he was unable to see the approach of the train because of the end of a car standing on a siding. Held, that it was proper to refuse to admit testimony of a witness as to an experiment

*See generally, foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168.

†For the authorities in this series on the subject of the admissibility of photographs as evidence in negligent cases, see foot-notes appended to *Davis v. Seaboard Air Line Ry.* (N. Car.), 18 R. R. R. 163, 41 Am. & Eng. R. Cas., N. S., 163.

‡As to the admissibility of experimental evidence in negligence case, see extensive note appended to *Louisville Ry. Co. v. Hoskins* (Ky.), 17 R. R. R. 484, 40 Am. & Eng. R. Cas., N. S., 484.

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made by him with a board, which it was claimed was placed approximately where the end of the car stood at the time of the accident; the position and width of the board and the position of the witness being altogether dissimilar from the situation of the car and plaintiff, according to his testimony.

Same—Opinion Evidence.—It was proper to permit witnesses, who testified that they were familiar with the situation at the time of the accident, to state how far the track could be seen by one standing where plaintiff stood under the conditions that existed at the time of the accident.

Same—Excessive Speed—Proximate Cause—Instruction.—In an action against a railroad company for the killing of a team of horses, which became frightened at a train within the limits of a village, the court instructed that it was negligence on the part of the railroad company to run its trains through a village at a rate of speed prohibited by law, and that if it did so, and thereby destroyed the property of a person in the exercise of reasonable care, the railroad would be liable. Held, that the instruction was not erroneous as failing to state that the proximate cause of the injury must have been the unlawful speed of the train.

Same—Same—Presumption of Negligence—Instruction.—An instruction that when a railroad company runs its trains through a village at a greater rate of speed than is permitted by the ordinance of the village, and stock is killed or injured by the train, the injury is to be presumed to have been done through the negligence of the railroad, was not erroneous on the ground that it directed a verdict for plaintiff.

Same—Same—Same—Same—Proximate Cause.—The court instructed that, if a railroad runs a train through a village at a greater speed than is permitted by ordinance, it is liable for all damage done to the property of any one injured by the train, if the person injured is exercising due care. An instruction given on behalf of defendant told the jury that although the law presumes that, where a train is run at a rate of speed in excess of the ordinance and injury is done, the injury is the result of negligence, the presumption may be rebutted, and that if the injury in question was not caused by the excessive speed, but by plaintiff's horses becoming frightened because they were afraid of a locomotive, plaintiff could not recover. Held that, in view of the latter instruction, the former was not erroneous as failing to state that the unlawful speed must have been the proximate cause, and that it declared a fixed liability.

Appeal from Appellate Court, Second District.

Action by John A. Crose against the Chicago & Eastern Illinois Railroad Company. From a judgment of the Appellate Court, affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action on the case, brought by appellee in the circuit court of Iroquois county, to recover damages for the killing of his team of horses, and injury to a team of mules, wagon, and harness, by being struck by a train of appellant. Trial was had before a jury at the November term, 1901, resulting in a verdict for \$325 in favor of appellee. A new trial being granted, the second verdict was for \$350, which has been sustained by the Appellate Court. A certificate of importance has been granted, and the case is here by appeal.

Milford is an incorporated village on the line of appellant's road. Through the limits of the village, extending north and

south, appellant has a double track; trains going north using the east track, and trains going south using the west track. East of the east main track was a side track, which ran north and south parallel with the east main track for a certain distance, and at the south end curved to the west or southwest, so as to unite with the east main track. Three parallel streets, extending east and west, crossed these tracks. The north one of these three streets was Jones street, the middle one Lisle street, and the south one Ashford street. On the block between Jones and Lisle streets was appellant's depot, which was on the west side of the main track. The side track begins to curve to the southwest in the south part of the block between Lisle and Ashford streets, just north of Ashford street, and it unites with the east main track on the south side of Ashford street. On the afternoon of February 4, 1901, appellee and his employees, with four wagon loads of wood, drove east on Lisle street, crossed the two main tracks, turned into the space between the east main track and the side track, and drove south to a point about 150 or 170 feet south of Lisle street and about 40 feet north of Ashford street. The space between the east rail of the east main track and the west rail of the side track was 20 feet wide on the south side of Lisle street at the point where appellee with his teams entered the space, but narrowed towards the south, and where the cars into which appellee was to load his wood stood on the side track the space between the side track and the east main track was about 15 feet wide. The first team was driven by Samuel Lyons, the second by Samuel Crose, a son of appellee, the third by Frank Hevron, and the fourth by appellee. The team driven by Lyons stopped opposite the south car which was to be loaded. On the east side of the track, opposite the place where these cars stood, there were certain lumber piles and coal sheds, so that the cars could not be loaded from the east side of the side track, and had to be loaded on the west side of the side track, opposite the east main track. After the teams had taken their stations alongside of the cars, and while the men were engaged in loading the wood into the cars, a fast passenger train approached from the south upon the east main track, running at the rate of from 30 to 60 miles per hour. It was due at Milford at 3:15 in the afternoon, and was about seven minutes late. Some of the witnesses testified it was running at the rate of 50 to 60 miles an hour, while the engineer testified that it was running at the rate of from 30 to 35 miles an hour. There is some conflict in the evidence as to whether the bell was rung or whistle sounded as the train approached a bridge about one-half mile south of the cars. As the train approached the cars the team driven by Hevron became frightened. He jumped from his wagon, or from the car, and attempted to hold the horses by the bits, but they swung him and themselves against the car, and he and the team were instantly killed. The team back of him, and the wagon and harness, were also injured. There is no dispute as to the property being worth \$350.

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Freeman P. Morris and *Frank L. Hooper* (*W. H. Lyford* and *E. H. Seneff*, of counsel), for appellant.

Dyer & Wallbridge, for appellee.

PER CURIAM. At the close of appellee's evidence, and again at the close of all the evidence, the defendant requested the court to instruct the jury to find it not guilty. The court refused both requests, and that refusal is assigned as error. The principal contention on this branch of the case is that appellee was guilty of such contributory negligence as should bar a recovery. In cases of this kind the question as to whether or not a person was guilty of contributory negligence is generally one of fact for the jury, and only becomes a question of law when the evidence so clearly fails to establish due care that all reasonable minds would reach the conclusion that there was such contributory negligence. *Hoehn v. Chicago, Peoria & St. Louis Railway Co.*, 152 Ill. 223, 38 N. E. 549; *Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086. If the evidence on the question is in conflict, or if there is evidence fairly tending to support the verdict, or if reasonable minds might arrive at different conclusions, it is a question of fact, and must be submitted to the jury (*Werk v. Illinois Steel Co.*, 154 Ill. 427, 40 N. E. 442), and its verdict, and the judgment of the trial court thereon, affirmed by the Appellate Court, are final and conclusive.

It cannot be seriously contended that the evidence in this record does not make a case of prima facie negligence against the defendant company at the time of the accident. There was then in force in the village of Milford an ordinance making it unlawful for any railroad company to propel any engine or train upon any railroad track within the limits of the village at a greater rate of speed than 10 miles per hour. This ordinance was pleaded in hæc verba in one of the counts of the declaration, and was introduced in evidence upon the trial. Section 87 of chapter 114 of Hurd's Revised Statutes of 1903, provides that, whenever any railroad corporation shall run any train or engine or car at a greater rate of speed through the incorporated limits of any city, town, or village than is permitted by any ordinance thereof, such corporation shall be liable to the party aggrieved for all damages done to persons or property by such train, engine, or car, and the same shall be presumed to have been done by the negligence of said corporation or its agents. It is undisputed that the train which caused the injury in this case was running at a greater rate of speed than 10 miles per hour, in violation of the village ordinance, and, this being so, a prima facie case of negligence was established against the appellant (*Illinois Central Railroad Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521), and the injury must be presumed to have been inflicted by the negligence of the appellant company or its agents operating such train, and in such case it would be liable for all damages occasioned thereby. Such presumption may be rebutted, but the question whether the appellant's evidence was sufficient, under

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all the circumstances, to overcome the prima facie proof of negligence, was a question for the jury, and was properly submitted to it, and the judgment of affirmance by the Appellate Court is conclusive. (Louisville, Evansville & St. Louis Railroad Co. v. Spencer, 149 Ill. 97, 36 N. E. 91; Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Hornsby, 202 Ill. 138, 66 N. E. 1052.)

It is earnestly contended by counsel for appellant that the evidence so far fails to prove that the plaintiff was not himself guilty of contributory negligence as to resolve that question into one of law for the determination of the court. In support of this position it is insisted that the evidence shows that prior to the accident he had been hauling wood to Milford and loading it in cars on appellant's track, and was familiar with the situation, side tracks, and all other surroundings; that he knew the team which was killed was afraid of the cars, and also that the fast train which caused the injury was due at the time he drove between the tracks; that he did not look or listen for the train, and after he heard it whistle at the bridge he had sufficient time to unfasten the team and thus avoid the accident; and that there is no evidence tending to show that the speed of the train in any way contributed to the accident. There is evidence to the effect that on the morning of the accident appellee applied to the agent of the appellant company for cars to be loaded with wood, and asked the agent to permit him to load the cars farther north of the place of the accident, on a side track near the elevator, so that he could approach the track from the east side, and not be compelled to enter the space between the side track and the main track, but was informed by the agent that the side track farther north was occupied by other parties, and he would have to load his cars between the tracks. It must be inferred from this evidence that he was attempting to unload his wood into the cars at the place of the accident, and drove his team in the space between the tracks, by the direction of the defendant or its agent, and he therefore had the right to assume that the defendant would not render his position hazardous by any act of negligence on its part. Chicago & Northwestern Railway Co. v. Goebel, 119 Ill. 515, 10 N. E. 369. As to his duty to watch and listen for approaching trains, it must be borne in mind that he had the right to presume that such trains would be run with proper care, and also that he and his men were rightfully engaged in unloading the wood at the time, and therefore were not bound to exercise that degree of care in looking and listening which would have been required of them had they not been so engaged. The evidence further tends to show that the car furthest south upon the side track was larger than the other cars, and on account of its size and the curve of the track it obstructed the view of an approaching train; also, that no whistle was sounded or bell rung upon the approaching train, and the first knowledge appellee had of the danger was the smoke from the engine as it appeared over the top of said southernmost car, and from the time the

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smoke was so seen until the train passed, causing the injury, there was not sufficient time within which to remove the horses or otherwise avoid the accident. It was also further shown that on account of the train being late appellee supposed that it had already passed before he drove in the space between the tracks. It is true that as to most of these facts there is an irreconcilable conflict in the evidence, but it cannot, we think, be seriously claimed that there is no competent testimony fairly tending to establish them, or that, considered together, they do not fairly tend to prove that the plaintiff was at the time of the injury in the exercise of ordinary care for the safety of his property. Unless it can be said that he was guilty of negligence in driving his team between the tracks, the evidence clearly justifies the conclusion that he was not guilty of contributory negligence; and we think it equally clear that it cannot be said, as a matter of law, that he was negligent in so driving between the tracks. As already said, he was there in the lawful transaction of business with the defendant company and by the direction of its agent. The trial court properly refused to take the case from the jury.

The defendant offered in evidence three photographs, which, on objection by counsel for plaintiff, were excluded, and this is assigned for error. The appellee, who drove the fourth wagon and came up behind the other three between the tracks, testified that he was unable to see the approaching train when it reached the bridge, which is about a half mile south of the place of the accident, because the corner of the south car, located at a point where the side track curved to the west to join the main track, projected over the west side of the side track about two feet, and thus obstructed the view to the south. The photographs were offered for the purpose of contradicting this testimony by showing that the view was not obstructed in the manner stated, and also for the purpose of showing the location of the tracks and cars at the place of the accident. Photographs offered in evidence for the purpose of contradicting witnesses or explaining a transaction are only competent when they are shown to have been so taken as to correctly exemplify the actual situation, circumstances, and surroundings at the time. When the situation and surrounding circumstances are subject to change, photographs, to be of any value as evidence, must be shown to have been taken at the time, or when the situation and surroundings are unchanged. *Chicago & Alton Railroad Co. v. Corson*, 198 Ill. 98, 64 N. E. 739; *Lake Erie & Western Railroad Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573. In this case the evidence shows that the photographs were taken 12 months after the transaction. The situation as to cars on the side track and the approaching fast train had necessarily changed. An attempt was made by the agent of the company to replace similar cars in similar positions on the side tracks; but he testified that he did not know just exactly how far it was from the main track to the south car, but says that after he looked the situation over "he could tell within a few feet of it." He took no actual measure-

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ments of the situation as it existed on the day of the accident. One of the witnesses, in testifying in regard to the photographs, says as to the location of the cars as shown by them: "Of course, it might have varied a few feet." The offered photographs do not show wagons alongside the cars in the space between the side track and the main track, although it is undisputed that there were three wagons ahead of the one on which appellee was sitting when he testifies he first saw the smoke from the engine. There were piles of lumber both east and west of the side track at the time of the accident, and the photographs do not show them. It also appears from the evidence that one of the cars placed on the side track for the purpose of taking the photographs was different in size from the one which stood there at the time of the accident. Another witness, called to verify the correctness of the photographs, says: "We stood a car as near as we could remember where the car stood, just about a year after the accident." It needs no argument to show that a variation of a few feet in the location of the cars might make a vast difference as to whether the view was obstructed at the time of the injury or not. The testimony of the appellee is that he was on the east side of his wagon, next to the cars on the side track, when he discovered the smoke. Only one of the photographs offered in evidence purports to have been taken while the photographer stood with his instrument in the neighborhood of the place where appellee was at that time. A photograph taken under the circumstances shown by the evidence in this case would certainly be incompetent to contradict the testimony of the plaintiff below, and would have tended rather to mislead and confuse the jury than to enlighten them.

A colored plat or map showing the location of the tracks and the situation was introduced in evidence. It is admitted by counsel for appellant that this map gave a general idea of the tracks and surroundings at the place. Witnesses were also introduced by the defendant who testified to the effect that the view of the track from the direction of the approaching train was unobstructed as far south as the bridge, thus contradicting the testimony of the plaintiff sought to be disproved by the photographs. We are clearly of the opinion that the pictures or photographs offered in evidence and objected to by counsel for the plaintiff were, under the evidence in the case, incompetent and properly excluded. But, if it were otherwise, the exclusion of the testimony worked no injury to the defendant. *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869.

One Samuel Lyons drove the first team that entered the space between the tracks and stopped alongside the south car. In his testimony as a witness for the plaintiff, on direct examination he said: "I saw the smoke before I saw the train, and the train then came in sight in a short time. I just got hold of my horses. As I remember, I was on my wagon then and jumped down. I don't think any of these parties had unloaded any wood

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from these four loads before the train came." Upon cross-examination his attention was called to a statement which he had made, a few days after the accident, before a police magistrate by the name of Cleaver, and was asked if this question was not put to him by Cleaver at that time: "State fully how the accident occurred and what the injured person was doing when it happened. Where were you at the time of the accident, and what were you doing?" And whether he did not make the following reply to that question: "Can't say just how the accident occurred, but do know that the injured person was unloading wood from a wagon into a car standing on the east switch. I had charge of one of the teams hauling wood, and as soon as I saw the train approaching went to the head of my horses, so as to hold them, and was so engaged at the time of the accident." The object of this examination was to impeach the witness by showing that he had, in the prior statement made by him, contradicted what he said as a witness upon the trial. At the trial he said he did not think that any one of the parties had unloaded any wood before the train came, whereas in the statement made before the magistrate he had stated that the injured person—that is, Hevron—was unloading wood from a wagon into a car standing on the east switch. The trial court refused to admit the written statement, and this is charged to be error. An examination of the testimony of the witness will show that he admitted that he made the statement in question before Cleaver, the magistrate. He said: "The paper which you show me * * * has my signature on the back of it. I signed it on February 7, 1901. Cleaver wrote it out for me and read it over to me. I think, as well as I can remember, that he asked me the questions. I gave Cleaver the information from which he wrote down these answers. I think he then read the paper over to me and I then signed it. This was at Mr. Cleaver's office in Milford, on February 7, 1901." In *Illinois Central Railroad Co. v. Wade*, 206 Ill. 523, 69 N. E. 565, we said (page 532 of 206 Ill., page 568 of 69 N. E.): "If a witness admits that he made statements imputed to him to have been made, as fully as claimed to have been made, further proof of the fact may be unnecessary; but when the witness denies, or does not directly admit, that he made the statement, the impeaching proof should be permitted to be given." It appears here that the question as claimed by counsel for appellant was addressed to the witness, and that he made the answer which he is charged with having made. In view of this admission, the fact of the contradiction was before the jury, even though the written statement made before the police magistrate was excluded. In addition to this, Cleaver, the magistrate, was placed upon the stand by the defendant, and asked if he did not address the question set forth in the written statement to Lyons, and if he did not make an answer thereto, also set forth in the written statement. He testified that he asked Lyons the question, and that Lyons gave the answer set forth in his statement. It is evident, therefore, that appellant could not have

received any greater benefit from the introduction of the written statement itself than it had from the proof thus introduced of what was in the written statement. And again, inasmuch as the question and answer sought to be introduced to the jury were read from the paper in their presence, in connection with the testimony of Cleaver, it is impossible to see how the appellant was prejudiced in any way because the paper itself was not admitted in evidence.

Appellant sought to prove the result of a certain experiment made by a witness, Borg, with a board $2\frac{1}{2}$ feet wide, which it was claimed was placed approximately where the south end of the south car stood at the time of the accident, and that, standing back and looking to the south, it furnished no obstruction to the view of the track. The object of this testimony was to contradict appellee as to the south car obstructing his view of the approaching train. The court refused to admit the testimony, and we think properly. The position and width of the board and the position of the witness Borg were altogether dissimilar from the situation of the car and the plaintiff, according to his testimony. Such an experiment would in no way tend to disprove the testimony of the plaintiff. As we have already said, the court had permitted witnesses, who testified that they were familiar with the situation and location at the time of the accident, to state how far the track could be seen south by a person standing between the main and side tracks north of where the accident occurred, under the conditions that existed at the time of the accident. We find no substantial error in the rulings of the trial court upon admission or exclusion of testimony.

It is insisted that the court erred in giving the second, third, and fourth instructions on behalf of the plaintiff. The second is as follows: "The court instructs the jury that it is negligence on the part of a railroad company to run its trains through a city, incorporated town, or village at a rate of speed prohibited by law, and if a railroad company does so run its trains, and thereby injuries or destroys the property of a person who is himself in the exercise of reasonable care and caution to avoid injury to such property, the company will be liable." The insistence is that the instruction fails to state that the proximate cause of the injury must be the unlawful speed of the train. We do not think the instruction should be so construed. The language is: "If a railroad company does so run its trains, and thereby injures or destroys the property of a person." This means that if a railroad company runs its train at a prohibited rate of speed, and thereby—that is, by so running at a prohibited rate of speed—it injures the property of another, the company will be liable. The word "thereby" refers to the unlawful rate of speed, and therefore the instruction does, in effect, require the speed of the train to be the proximate cause of the injury.

The third instruction is as follows: "The court instructs the jury that when a railroad company runs its trains through a

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city, incorporated town, or village at a greater rate of speed than is permitted by the ordinance of the city, town, or village, and stock is killed or injured by said train while so running, the injury will be presumed to have been done through the negligence of the railroad company." This instruction is almost in the exact language of the statute, and one quite similar to it was given in *Chicago, Burlington & Quincy Railroad Co. v. Haggerty*, 67 Ill. 113, and *Illinois Central Railroad Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521. The instruction does not direct a verdict, as contended, and, taken in connection with all the others given, we do not think it was so misleading as to constitute reversible error.

The fourth instruction is as follows: "The jury are instructed that, by the laws of this state, if a railroad company, by its agents or servants, runs an engine or train of cars in or through the limits of any incorporated city, town, or village at a greater rate of speed than is permitted by the ordinance of such city, town, or village, then the company is liable for all damage done to the property of any person injured by such engine or train of cars, provided the person injured is exercising due care for his property at the time in question." The criticism made upon this instruction is that it fails to state that the unlawful speed of the train must have been the proximate cause of the injury, and that it in express terms declares a fixed and absolute liability. It is doubtless subject to criticism, and standing alone might have been calculated to mislead the jury to the prejudice of the defendant. The second instruction given on behalf of the plaintiff covers the same point, as does also the seventeenth given on behalf of the defendant. The latter tells the jury that, although the law presumes that where a train is run at a rate of speed in excess of that fixed by the ordinance, and property is injured, and the injury was the result of negligence on the part of the company, yet such presumption of negligence may be rebutted by the evidence, and if the jury believe that the injury in question was not caused by the train running at a speed in violation of the ordinance, but that the injury was caused by appellee's horses becoming frightened at the train, and that the horses were not frightened by reason of the speed of the train but because they were afraid of a locomotive, then the appellee cannot recover upon the ground, alone, that the train was running at a greater rate of speed than that fixed by the ordinance. This instruction clearly covers the defect complained of in the foregoing fourth given on behalf of appellee.

On behalf of appellant 18 carefully prepared instructions were given to the jury, which, when considered as a series and in connection with those given at the instance of plaintiff, covered every material question in the case. It cannot, we think, be said that the verdict of the jury was in any way the result of misdirections as to the law.

We have endeavored to give careful consideration to each of

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the numerous points made by counsel for the appellant in **their** argument urging a reversal of the judgment below, and **are** convinced that no reversible error has been committed. **The** judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WILLIAMS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, March 27, 1906.)

[53 S. E. Rep. 448.]

Trial—Instruction—Opinion on Evidence.—In an action for fire spreading from a railroad right of way, a charge that even if the fire was communicated to the right of way, the plaintiff cannot recover, since the engine was in good repair and equipped with an improved spark arrester, and was managed in a careful manner by a competent engineer, and the evidence as to this is uncontroverted and uncontradicted, is properly refused as an expression of opinion on the facts, forbidden by Revisal 1905, § 535.

Railroads—Fires—Negligence of Railroad Company.*—Where fire escapes from an engine in proper condition, having a proper spark arrester and operated in a careful manner by a skillful and competent engineer, and the fire catches off the right of way, the railroad company is not liable, for there is no negligence.

Same.†—Where fire escapes from an engine in proper condition with a proper spark arrester, and operated in a careful way by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to adjoining premises, the railroad company is liable.

Same.‡—Where fire escapes from a defective engine, or a defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, and fire catches off the right of way, the railroad company is liable.

*For the authorities in this series on the subject of the effect of the exercise by defendant of due care in furnishing spark arresters and operating train, in action for the destruction of property by fire from a locomotive, see foot-note appended to *Atlantic Coast Line R. Co. v. Watkins* (Va.), 18 R. R. R. 482, 41 Am. & Eng. R. Cas., N. S., 482; foot-notes appended to *Anderson v. Oregon R. Co.* (Ore.), 12 R. R. R. 625, 35 Am. & Eng. R. Cas., N. S., 625.

†For the authorities in this series on the subject of the duty of a railroad company to keep its right of way clear of combustible material, see foot-notes appended to *Atlantic Coast Line R. Co. v. Watkins* (Va.), 18 R. R. R. 482, 41 Am. & Eng. R. Cas., N. S., 482; foot-notes appended to *Sprague v. Atchison, etc., Ry. Co.* (Kan.), 15 R. R. R. 471, 38 Am. & Eng. R. Cas., N. S., 471; *Knickel v. Chicago & N. W. Ry. Co.* (Wis.), 15 R. R. R. 453, 38 Am. & Eng. R. Cas., N. S., 453.

‡For the authorities in this series on the subject of the duties and liabilities of railroad companies relating to fires set by their locomotives (questions of statutory law, damages, and evidence excluded), see foot-notes appended to *Norfolk & W. Ry. Co. v. Fritts* (Va.), 18 R. R. R. 246, 41 Am. & Eng. R. Cas., N. S., 246; foot-notes appended to *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.* (C. C. A.), 17 R. R. R. 280, 40 Am. & Eng. R. Cas., N. S., 280; *Birmingham Ry., Light & Power Co. v. Hinton* (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173.

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Same—Question for Jury.—In an action for fire spreading from a railroad right of way, evidence held to present a question for the jury whether the fire was communicated from the railroad engine, and whether the right of way was foul with combustible matter on it.

Appeal from Superior Court, Duplin County; W. R. Allen, Judge.

Action by W. H. Williams against the Atlantic Coast Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Junius Davis and *H. L. Stevens*, for appellant.

Rountree & Carr and *Carlton & Williams*, for appellee.

CLARK, C. J. This action is for the recovery of damages for negligently setting fire to and burning the woods of the plaintiff by sparks from an engine falling upon a foul right of way. The errors assigned are: (1) Refusal to nonsuit. (2) That there was no evidence that the fire originated from the defendant's engine. (3) Refusal to charge that "even if the fire was communicated to the defendant's right of way, the plaintiff cannot recover, for the engine was in good repair and equipped with an improved spark arrester for preventing the escape of sparks, and was managed and operated in a careful manner by a skillful and competent engineer, and the evidence as to this is uncontroverted and uncontradicted."

This prayer was properly refused because it would have been an expression of opinion upon the facts forbidden by the act of 1796. Revisal 1905, § 535. Though a witness may be uncontradicted, it is for the jury to say whether they believe him. The judge is prohibited from expressing an opinion that "a fact is fully or sufficiently proved, such matter being the true office and province of the jury." Revisal 1905, § 535. Besides, though the fact were found by the jury that the fire was not set out by a defective engine, the legal conclusion in the prayer is incorrect, if the fire began on a foul right of way. The rules of negligence applicable to cases of this kind are: (1) If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence. (2) If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. *Moore v. Railroad*, 124 N. C. 341, 32 S. E. 710; *Phillips v. Railroad*, 138 N. C. 12, 50 S. E. 462. (3) If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way, or not by a skillful engineer, and the fire catches off the right of way, the defendant is liable. In the first case there would be, as above stated, no negligence. In the second case the foul right

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of way would be negligence, and in the third the defective engine or spark arrester, or the negligent operation of a good engine, would be negligence.

The other two exceptions of the defendant amount simply to a claim that there was no evidence that the fire proceeded from the defendant's engine. No one testified that he saw the sparks fall from the engine upon the right of way. It is rarely that this can be shown by eyewitnesses, for it would usually happen *that* if the sparks were seen at the moment of falling and igniting the stubble, the fire would be put out by the observer. But here the fire was seen on the right of way, it burnt along the track between the ditch and the ends of the ties, and thence had gone into the woods. The wind was blowing from the northwest across the track, the fire being on the south side. Two witnesses testified that they first saw the smoke about 30 minutes after the defendant's engine passed. How long before that the fire began no one knew, but there was no fire before the engine passed. The other witnesses first saw the fire after a longer interval, and there was evidence that the fire burnt both ways. These were matters for the jury. The evidence was plenary that the right of way was foul, with much combustible matter on it, bushes having been cut down and allowed to lie. Indeed the fact that the right of way was burned over is evidence of combustible matter thereon, and the section master stated in his testimony that it was not kept cleaned off. In *McMillan v. Railroad*, 126 N. C. 726, 36 S. E. 129, it is said that "no spark arrester can be so constructed as to entirely prevent the emission of sparks without destroying the efficiency of the engine, and while it is not negligence in the defendant to run such an engine over its road, the fact that it had recently passed over the road and fire was found there, was some evidence tending to show that it emitted sparks that set the grass on fire." The evidence of the negligent and foul condition of the track and the discovery of the fire so soon after the defendant's train passed, was sufficient to submit the question to the triors of the facts. The court was not authorized to draw the inferences of fact from this testimony. In *Armstrong v. Railroad*, 130 N. C. 66, 40 S. E. 856, there was no evidence that the fire originated upon the right of way, or that connected it with the engine in any way. In *Ice Co. v. Railroad*, 126 N. C. 797, 36 S. E. 279, there was no evidence that the engine was defective nor that the right of way was foul. In *Cheek v. Lumber Co.*, 134 N. C. 225, 46 S. E. 488, 47 N. E. 400, there was no spark arrester, but on the conflicting evidence whether sparks from the engine caused the fire, the jury found that they did not.

It was the plaintiff's right to have this case submitted to the jury. Though we know that the words "*judicium parium suorum*" in Magna Charta, c. 39, did not either create or guaranty the right of trial by jury (as at one time was erroneously thought), McKechie, Magna Charta, 452, trial by jury having been instituted after that time, still in the process of time and

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the evolution of law, it has become a part of the "law of the land." The Constitution of the state (article 1, § 19) guaranties it as a "sacred and inviolable" right in civil cases, and section 13 of the same article guaranties the same right in criminal actions. We know that the failure to insert a similar guaranty in the Constitution of the United States was one of the chief grounds of objection to its ratification, an objection which was only cured by an understanding that amendments guarantying the right of trial by jury in the federal courts should be adopted, which was done by the first Congress, and being promptly ratified by the states, they now constitute the sixth and seventh amendments. A right so guarantied should not be denied, unless it is clear that there is no evidence. As was said in *State v. Kiger*, 115 N. C. 751, 20 S. E. 458: "If the presiding judge deems that the verdict is against the weight of the evidence, or that the evidence was insufficient in his judgment to justify conviction, he is vested with the power to set aside the verdict and grant a new trial. This is a matter of discretion, and his granting or refusing a new trial on such ground is not subject to review here. The fact that the 12 men have convicted on the evidence will often and properly make him less sure of his own opinion to the contrary." This case has been repeatedly cited with approval. In *State v. Chancy*, 110 N. C. at page 508, 14 S. E. at page 781, Shepherd, J., says: "In some jurisdictions it has been held that if the testimony be such that the judge would set the verdict aside as being against the weight of the evidence, it should not be submitted to the jury; but this, according to our decisions, would be an usurpation of the functions of that body"—citing *State v. Allen*, 48 N. C. 257.; *Wittkowsky v. Wasson*, 71 N. C. 451, and he then adds, "perhaps what is 'reasonably sufficient' evidence as understood in North Carolina, is best stated by Battle, J., in *Jordan v. Lassiter*, 51 N. C. 131. He says that if the circumstances 'be such as to raise more than a mere conjecture, the judge cannot pronounce upon their sufficiency to establish the fact but must leave them to be weighed by the jury, whose exclusive province it is to decide upon the effect of the testimony.'"

No more subtle and adroit application could be addressed to a trial judge than a motion of this kind with its necessary implication that the jury may do wrong and injustice, and that the superior intelligence and greater impartiality of the judge are invoked to prevent it. But the experience and the wisdom of the ages and the deliberate judgment of the people, as embodied in the Constitutions of both the state and the Union, are conclusive that in passing upon the facts the opinion of one man, though skilled in the law, is not deemed superior to that of 12 men of the vicinage, but is held to be decidedly inferior and to be guarded against, so much so that the guaranty of a trial by jury in both civil and criminal cases is placed in the organic law which every judge is sworn to observe before he is permitted to discharge his functions.

No error.

SOUTHERN RY. CO. v. POGUE.

(Supreme Court of Alabama, April 4, 1906.)

[40 So. Rep. 565.]

Appeal—Pleading—Amendment—Objections—Record.—Where an objection to the allowance of an amendment to the complaint was shown only by the record of the minutes of the trial court, and not by the bill of exceptions, the ruling could not be reviewed.

Railroads—Injury to Animals—Action—Variance.—Where a complaint against a railroad charged the killing of plaintiff's "horse," proof that the animal killed was a "mare" did not constitute a fatal variance.

Same—Ownership.—In an action against a railroad company for the killing of plaintiff's horse, evidence that witness saw signs of blood and hair on the track, and that the hair looked like that of "plaintiff's horse," was some evidence of plaintiff's ownership of the mare admitted to have been injured.

Same—Negligence—Question for Jury.—In an action against a railroad company for the killing of plaintiff's horse, evidence held to require submission of the question of defendant's negligence to the jury.

Same—Instructions.*—In an action against a railroad company for killing plaintiff's horse, instructions requested by defendant which omitted to hypothesize the fact that the engineer was keeping a proper lookout and could not have discovered the horse earlier, and that the train was properly equipped, were properly refused.

Same.†—In an action against a railroad company for killing plaintiff's horse, an instruction that, if the horse was killed by reason of the engineer running the train at such a rate of speed that it could not be stopped within the glare of the headlight, plaintiff was entitled to recover, was proper.

Appeal—Prejudice—Abstract Instructions.—Where an instruction given asserted a correct proposition of law, the fact that it was abstract was no ground for reversal.

*For the authorities in this series on the question whether it is the duty of trainmen to lookout for stock on or near tracks, see foot-notes appended to *Cincinnati, etc., R. R. v. Burgess* (Ky.), 18 R. R. R. 160, 41 Am. & Eng. R. Cas., N. S., 160; foot-notes appended to *Southern Ry. Co. v. Hoge* (Ala.), 17 R. R. R. 792, 40 Am. & Eng. R. Cas., N. S., 792; foot-notes appended to *Southern Ry. Co. v. Henry* (Ga.), 17 R. R. R. 198, 40 Am. & Eng. R. Cas., N. S., 198; *St. Louis, etc., Ry. Co. v. Kimberlain* (Ark.), 16 R. R. R. 479, 30 Am. & Eng. R. Cas., N. S., 479; foot-notes appended to *St. Louis & S. F. Ry. Co. v. Carlisle* (Ark.), 16 R. R. R. 462, 39 Am. & Eng. R. Cas., N. S., 462; *Prescott & N. W. Ry. Co. v. Brown* (Ark.), 16 R. R. R. 132, 39 Am. & Eng. R. Cas., N. S., 132.

†For the authorities in this series on the subject of the care required of those in charge of trains to avoid collisions with animals, see foot-notes appended to *Atlanta & W. P. R. Co. v. Hudson* (Ga.), 18 R. R. R. 490, 41 Am. & Eng. R. Cas., N. S., 490; *Georgia Southern & F. Ry. Co. v. Jones* (Ga.), 18 R. R. R. 154, 41 Am. & Eng. R. Cas., N. S., 154; *Atlantic Coast Line R. Co. v. Waycross Elec. L. & P. Co.* (Ga.), 17 R. R. R. 208, 40 Am. & Eng. R. Cas., N. S., 208; *Southern Ry. Co. v. Henry* (Ga.), 17 R. R. R. 198, 40 Am. & Eng. R. Cas., N. S., 198; see also, *Carman v. Montana Cent. Ry. Co.* (Mont.), 17 R. R. R. 795, 40 Am. & Eng. R. Cas., N. S., 795; *Borneman v. Chicago, etc., Ry. Co.* (S. Dak.), 16 R. R. R. 464, 39 Am. & Eng. R. Cas., N. S., 464; *Laronde v. Boston & M. R. R.* (N. H.), 16 R. R. R. 223, 39 Am. & Eng. R. Cas., N. S., 223; foot-notes appended to *O'Leary v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 141, 39 Am. & Eng. R. Cas., N. S., 141.

Southern Ry. Co. v. Pogue

Appeal from City Court of Gadsden; John H. Disque, Judge.
"To be officially reported."

Action by B. M. Pogue against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action by appellee against appellant for killing by appellant's train of a horse belonging to appellee. The original summons and complaint contained two counts and were in the name of Mrs. J. L. Pogue. The complaint was afterwards amended by changing the initials, "J. L.," of the plaintiff, to "Barnett M.," thus making the plaintiff's name "Barnett M. Pogue" instead of "J. L. Pogue." There was objection by defendant to this amendment, and the objection was overruled. These facts appear only in the minute entry, and were not set out in the bill of exceptions. There were several pleas not necessary here to be set out, and issue was joined on the general issue. The facts sufficiently appear in the opinion.

The plaintiff requested the following charge: Charge 3: "The court charges the jury that, if they are reasonably satisfied from the evidence that the horse was killed by reason of the engineer running the train at such rate of speed that it could not be stopped within the distance the horse could be seen by the use of the headlight, they will find for the plaintiff."

The defendant requested the following written charges, which were refused: First. General affirmative charge. Charge 2: "The court charges the jury that if the mare ran on the track suddenly from the woods, so near the engine that it was impossible to stop the train before the mare was struck, by the use of all the means used by well-regulated railroads, then your verdict should be for the defendant." Charge 3: "The court charges the jury, if the mare ran on the track suddenly from the woods, so near the engine that it was impossible to stop the train before the mare was struck, by the use of all means used by a well-regulated railroad, then the engineer was not required to do anything to stop the train." Charge 4: "The court charges the jury, if the jury believe from the evidence that the mare came suddenly on the track, so close to the engine that the engineer could not stop in time to prevent running over her, her destruction cannot be ascribed to defendant's negligence, and in that event their verdict should be for the defendant." Charge 5: "The court charges the jury that if they find that the mare rushed suddenly from the woods on the railroad track, so near to the engine that it could not have been stopped in time to have avoided injuring the mare by the use of all the means used by a well-regulated railroad, then your verdict should be for the defendant." Charge 6: "The court charges the jury the fact that the engineer could not see beyond 40 or 50 yards with the headlight he had cannot make the defendant liable in this case, if the jury believe from the evidence that the mare, after she got on the track, was never beyond 40 yards from the engine."

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Charge 7: "The court charges the jury, if the mare ran suddenly on the track from the woods, so near the engine that it was impossible to stop the train before the mare was struck, by the use of all the means used by well-regulated railroads, then the engineer was not required to do anything to stop the train, and the plaintiff could not recover." Charge 8: "The court charges the jury that if they find that the mare rushed rapidly from the woods onto the railroad track, so near the engine that it could not have been stopped in time to have avoided injuring the mare by the use of all the means used by well-regulated railroads, it would make no difference whether the engineer could see more than 40 or 50 yards by the headlight, and in that event your verdict should be for the defendant."

There was verdict and judgment for plaintiff for \$98.

Burnett, Hood & Murphree, for appellant.

Cullie & Martin, for appellee.

TYSON, J. The counts of the complaint are the same as those in *Southern Railway Co. v. Hoge* (Ala.) 37 South. 439, *mutatis mutandis*, in which case we held that the demurrer, which was substantially as the one here interposed, was not well taken. We see no reason for departing from that ruling.

The objection taken to the allowance of the amendment of the complaint, and the exception reserved thereto, which were necessary to a review of the action of the trial court, should be shown by the bill of exceptions. Being shown only by the record of the minutes of the court below, we cannot review that ruling. *Bryan v. Wilson*, 27 Ala. 214; *Tuscaloosa W. Co. v. Mayor and Aldermen of Tuscaloosa*, 38 Ala. 516; *Mahoney v. O'Leary*, 34 Ala. 97, 99.

It is next insisted that the affirmative charge requested by defendant should have been given, because, first, the evidence undisputedly and affirmatively showed that the servants of defendant in operating the train were not guilty of any negligence; second, there was no proof of the ownership of the mare by plaintiff; and, third, this action was brought for the killing of a horse, whereas the evidence shows that the animal killed was a mare. We shall dispose of these insistences in the inverse order in which they are made:

It is true the complaint is for injuring or killing a horse, and it is also true that the animal injured was a mare. But this does not constitute a variance. The word "horse" is broad enough to include, and does include, the female sex of that genus, and therefore a mare is included in it.

It is also true that there was no direct testimony that plaintiff owned the mare shown to have been injured; but one of the witnesses, in describing the conditions of the place where the injury occurred, said: "I saw signs of blood and hair on the track. The hair looked like the hair of plaintiff's horse." This, we think, is some evidence of plaintiff's ownership of the mare that was admitted to have been injured.

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On the question of negligence vel non, the evidence tends to show that after the mare was seen by the engineer, and after she had actually gotten upon the track, she ran along it a distance of some 40 or 50 yards before she was overtaken by the engine, and then carried about 40 yards before she was knocked off. The engineer admits he saw her approaching the track some 15 or 20 feet from it before going on it. How far he was from the point where she got upon the track when he saw her, and when he says he applied the air brakes and blew the stock alarm, he did not state; nor did he know how far the train ran after he applied the air brakes. The speed of the train at the time he saw her was between 25 and 30 miles an hour, and he stated that in his judgment the train could not have been stopped in less than 100 yards. He did not remember whether or not he reversed his engine; nor did he testify that he used all the appliances at hand to stop the train in order to avoid the injury. It is true, he stated he did all he could to stop the train and prevent the injury. But it is inferable that all he did was to apply the air brakes. The court was not bound to accept his opinion that the train could not have been stopped within less than 100 yards. But, conceding that it could not have been stopped in a less distance than stated, it is not shown with any degree of certainty but that his train traversed a greater distance than 100 yards after he saw the mare approaching the track and before the engine struck her. He could have seen her 50 yards away as she approached the track, and if he did see her it is inferable that his train traveled more than 100 yards before it overtook her, and more than 150 yards before knocking her off. But, if he did not see her, the track being straight, it was open to the jury to find that he could have done so by keeping a proper lookout, and therefore he was negligent in that respect. So, then, under either aspect of the inferences afforded by the evidence, the question of negligence was for the jury; and the charge was properly refused.

Charges 2, 3, 5, and 7 were properly refused on account of the omission to hypothesize the fact that the engineer was keeping a proper lookout, and might not have discovered the mare earlier, and that the train was properly equipped. This last criticism applies also to charges 4, 6, and 8. Their refusal was also proper. *Central of Ga. Ry. v. Stark*, 126 Ala. 365, 28 South. 411; *Central Ry. of Ga. v. Turner* (Ala.) 40 South. 355. The case of *L. & N. R. R. Co. v. Binkerhoff*, 119 Ala. 606, 24 South. 892, is clearly wrong on this point, and has been practically overruled.

Charge 3, given at the request of the plaintiff, asserts a correct proposition of law. If abstract, this is not a ground of reversal. The facts of the case are essentially different from those shown by the record in *Southern Railway v. Hoge*, supra, relied upon by appellant as supporting its contention that the affirmative charge should have been given.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

In re COE'S ESTATE. COE v. WAINWRIGHT.

(Supreme Court of Iowa, April 3, 1906.)

[106 N. W. Rep. 743.]

Death—Right of Action—What Law Governs.*—The right of action to recover for wrongful death depends solely on the statute of the state where the wrongful act is committed.

Same—Proceeds—Distribution.—A statute of Illinois creates a cause of action for wrongful death, and provides that the recovery shall be for the exclusive benefit of deceased's widow and next of kin, and shall be distributed to such widow and next of kin as provided by law in relation to the distribution of interstate personal property. The Illinois statute of distribution declares that if a husband dies without issue, leaving a widow, the whole of his personal property shall descend to her. Held that, where a resident of Iowa suffered wrongful death in Illinois, leaving a widow but no issue, and his Iowa administrator settled the railroad's liability, such sum was distributable to decedent's widow in Iowa, under the Illinois law.

Appeal from District Court, Harrison County; O. D. Wheeler, Judge.

Charles F. Coe, a resident of this state, was killed in a railway accident in the state of Illinois. Geo. W. Coe was duly appointed administrator of his estate in Harrison county, Iowa, and, as such administrator, he received from the railway company a certain sum as damages for causing the death of his intestate. This sum was paid in settlement of his claim against the company and without suit. The deceased left a widow, Jennie E. Coe, but no issue, and she claims the full amount secured by the administrator, as provided by the statute of Illinois. The defendants, Reuben Coe and Susan Coe, are the parents of the deceased, and claim that the fund is to be disposed of under the statute of this state, and that they are entitled to one-half of it. There was a judgment sustaining the plaintiffs' claim, and the defendants appeal. Affirmed.

Cochran & Egan, for appellants.

John W. Jacobs and Roadifer & Arthur, for appellees.

SHERWIN, J. There is but one question for determination, namely, to whom does this money belong? The statute of Illinois, under which claim was made for damages for the death of Coe, is as follows:

"Paragraph 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled

*For the authorities in this series on the subject of transitory actions and the extraterritorial effect of statutes creating a right of action, see foot-notes appended to *Baltimore & O. R. Co. v. Chambers* (Ohio), 18 R. R. R. 766, 41 Am. & Eng. R. Cas., N. S., 766; foot-notes appended to *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 18 R. R. R. 542, 41 Am. & Eng. R. Cas., N. S., 542; foot-notes appended to *Kansas City Southern Ry. Co. v. McGinty* (Ark.), 17 R. R. R. 71, 40 Am. & Eng. R. Cas., N. S., 71.

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the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

“Par. 2. Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin, of such deceased person and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; provided, that every such action shall be commenced within two years after the death of such person.”

Hurd's Rev. St. 1903, c. 70.

The Illinois statute also provides that if the husband die without issue, leaving a widow, the whole of his personal estate shall descend to her.

The right to recover in cases of this kind depends solely on the statute of the state where the wrongful act is committed. *Hyde, Adm'r, v. Wabash, St. Louis & Pacific Ry. Co.*, 61 Iowa, 441, 16 N. W. 351, 47 Am. Rep. 820. And while actions to recover damages for the death of a person are quite uniformly held to be transitory, it is nevertheless the general rule that, when the statute creating the liability limits recovery to certain persons, only the designated persons have any right to, or interest in, the amount recovered; and that a recovery in a jurisdiction, other than where the liability arises, will not justify a distribution of the fund not in accordance with the statute creating the right. This we conceive to be the sound rule. The liability being created solely by the statute, it is clear that it may also limit the beneficiaries thereunder; and, when it does so, it is equally as clear that the wrongdoer cannot be made to contribute to others, and that no one else has or can have any property interest in, or right to, the amount recovered, or any part thereof. Under the statute of Illinois, the railway company was not liable to the decedent's estate. It was only liable to his widow or next of kin, and then the damage paid is to be distributed as personal estate of the intestate, the whole of which, under the Illinois law, goes to the widow, if there be no issue.

The precise question under consideration has not heretofore been directly determined by this court, but the rule here announced finds support in the reasoning in the cases of *Morris v. Chicago, Rock Island & Pacific Ry.*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39, and *Hyde, Adm'r, v. Railway Co.*, supra. In

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the latter, an action was brought in this state to recover for the death of the plaintiff's intestate, who was killed by the defendant, in Missouri. The wrongful act having been done in that state, and the plaintiff not pleading or proving a statute thereof creating liability, we held there could be no recovery under the statute of Iowa. In discussing the question, it is said: "Again, if the cause of action survives, it must survive to some person or persons. A cause of action which survives only by statute must survive to the person or persons designated by statute." It is further said therein that, if the cause of action survived to particular persons, it could not be held to have survived to the personal representative. The reasoning of the Hyde Case fully supports our conclusion here. All of the cases in other jurisdictions, deciding the point, to which our attention has been directed, support the appellee's contention. In *Dennick v. Central R. R. Co.*, 103 U. S. 11, 26 L. Ed. 439, the plaintiff brought her suit in New York, to recover damages for the death of her husband by an accident on the defendant's railroad, in New Jersey. The statute of the latter state permitted a recovery for the benefit of the widow and next of kin, and, in answer to the contention that the administrator could only administer that which was of the estate of the deceased in his lifetime, Mr. Justice Miller said: "The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that, when the money recovered in such an action as this came to the hands of the administratrix, our courts could not compel distribution as the law directs." The question is decided in accordance herewith in the following cases: *McDonald v. McDonald*, Adm'r, 96 Ky. 209, 28 S. W. 482, 49 Am. St. Rep. 289; *Hanna v. G. T. Ry. Co.*, 41 Ill. App. 116; *Florida Central & P. R. Co. v. Sullivan*, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410; *Matter of Degarmo*, 86 Hunter, 390; *Stewart v. B. & O. R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. *In re Estate of Lucien Cook*, 126 Iowa, 159, 101 N. W. 747, and *Romano v. Brick & Pipe Company*, 125 Iowa, 600, 101 N. W. 437, 68 L. R. A. 132, 106 Am. St. Rep. 323, do not discuss or decide this question and are not in conflict with our conclusion.

The judgment is right, and it is affirmed.

HATTCHEE v. McDERMOT.

(Court of Appeals of Maryland, Feb. 13, 1906.)

[63 Atl. Rep. 214.]

Railroads—Crossing Accident—Negligence.*—In the case of a collision at a crossing of a suburban electric car with a team, the fact that the car was an extra, running 14 seconds behind a regular at such a speed that, while it was going the distance between the cars, the team going at a rapid walk went 130 feet, does not show negligence of the railroad company.

Same—Giving Signals—Evidence—Questions for Jury.—Though a suburban electric car must give a signal when approaching a crossing, testimony of the persons in the wagon struck by it that they did not hear the gong sounded is not evidence to go to the jury on the question of negligence, as a whistle might have been sounded.

Same—Contributory Negligence.†—The driver of a team which was struck by a suburban electric car at a crossing is precluded from recovering by contributory negligence, though the car was an extra, running 14 seconds behind the regular car; he having merely stopped at a distance of 130 feet from the crossing, at which time the regular passed, and then driven forward at a rapid walk, without again stopping or looking, except directly in front of him.

Appeal from Circuit Court, Prince George's County; Geo. C. Merrick, Judge.

Action by Bennett Hattcher against Allen L. McDermot, receiver of the City & Suburban Railway of Washington. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, JONES, SCHMUCKER, and BURKE, JJ.

F. Snowden Hill, for appellant.

Talbott & Talbott, for appellee.

BOYD, J. The appellant sued the appellee for injuries sustained by him in a collision between one of the defendant's cars and the plaintiff's milk wagon on what is known as the Beltsville Crossing, where the City & Suburban Railway of Washington crosses a public road, which was formerly the Washington & Baltimore Turnpike. The plaintiff was returning from the city of Washington to his home in Prince George's county in a milk wagon drawn by two horses about 9 o'clock at night. The night was dark, it was snowing, and the side curtains to the wagon were down. The plaintiff was familiar with the crossing, going daily to Washington over the public road, and also with the

*For the authorities in this series on the subject of the contributory negligence of highway traveler in attempting to cross railroad tracks as affected by fact that train by which he was injured was an extra one, see note appended to *Lamoureux v. New York, etc., R. Co.* (Mass.), 9 Am. & Eng. R. Cas., N. S., 245; *Bush v. Union Pac. R. Co.* (Kan.), 20 Am. & Eng. R. Cas., N. S., 798; *Northern Cent. Ry. Co. v. Medairy* (Md.), 7 Am. & Eng. R. Cas., N. S., 526.

†See foot-notes appended to *Greenawaldt v. Lake Shore, etc., Ry. Co.* (Ind.), 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816.

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absence of some proof on that subject, and the record discloses none, the court might very properly have declined to submit the case to the jury for want of evidence of negligence on the part of the defendant; for it was incumbent on the plaintiff to establish such negligence, which could not properly be done by simply showing that no gong was heard, without some evidence that no other sufficient warning was given.

2. But we are of the opinion that the plaintiff's testimony disclosed such contributory negligence on his part as precluded a recovery. We have seen that he stopped his wagon 130 feet from the crossing, and there looked and listened. The point where he stopped "was at or near the end of a high bank, which prevented him from seeing more than about 250 feet of the track from said crossing in the direction of Washington City," but the record goes on to state "that, as he approached said crossing, said sight of track lengthened near said crossing and extended probably half a mile." There is nothing in the record to support the suggestion of appellant's counsel that he could not have seen that distance on the night of the accident; but, on the contrary, he was explaining the conditions as they existed at that time. It certainly cannot be inferred from anything the plaintiff said that he could not have seen an electric car, if lighted in the usual way (and he did not say this one was not), a much greater distance than 250 feet, if he had looked. As soon as the first car cleared the crossing, plaintiff struck his horses with a whip, and they went toward the crossing "in a rapid walk, almost a trot." Plaintiff did not again stop, but, "looking in front of his wagon" (which was in the opposite direction from the approaching car), drove on the track. When the horses were on the track the servant called out: "My God! a car is coming," whereupon plaintiff struck the horses with his whip. They sprang forward, and cleared the track, but the car "struck the hind part of his wagon," threw it over and demolished it, causing the injuries to the plaintiff. On cross-examination he said "that he did not get up from his seat and look to the right around the curtain when he stopped. He looked directly ahead at the crossing. The car passed almost instantly. He thought there was no other car coming and went ahead." It is thus shown by the plaintiff's own testimony, as well as that of his companion, that he did not stop, excepting at the point 130 feet from the crossing, from which he could only get a view of 250 feet, and after the first car passed over the crossing he traveled the 130 feet, did not look in any direction excepting "directly ahead at the crossing," and did not say that he even listened, to ascertain whether another car was coming. He had a view of about half a mile down the track in the direction from which the car was coming, but, assuming there was no other coming, went ahead and drove upon the track in front of the second car. The least diligence would have enabled him to see it coming, and he could probably have heard it if he had listened, as any one ought to do before crossing a track. He does not show by his testimony that

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there was not the usual headlight in front, or that the lights in the car were out, and certainly there can be no presumption that the lights were not burning, especially in an electric car which usually stops when the lights go out, as the current is off the wire. It is simply another of the unfortunate cases that sometimes get into court, in which persons are shown to be seriously injured by taking too much for granted, instead of using their senses for their protection. It is difficult to understand how he could have failed to see the light from the car before he attempted to cross, as he and it were going in the same general direction, by reason of the acute angle made at the crossing, unless he was guilty of gross negligence, amounting to recklessness. The case differs altogether from some of those cited where safety gates at crossings were raised and treated by the courts as invitations for the traveling public to go upon the tracks. From what we have already said it will be seen that the fact that the regular car had just passed cannot be regarded as such invitation to cross, and there is nothing else in the record that could furnish any foundation for such contention. There being nothing to show that the motorman could have avoided the accident after discovering the plaintiff in a perilous position, it is unnecessary to discuss that feature which often enters into this class of cases. If the motorman saw him before he drove on the track, he had no cause to assume or fear that he would thus drive on the track in reckless disregard of his own safety. As the principles applicable to such cases are so well settled and have been so frequently applied by this court, we will not further prolong this opinion by citing other decisions rendered by us or other courts. From the facts disclosed in the record we are of opinion that the plaintiff failed to establish such negligence on the part of the defendant as would entitle him to recover; but, if we had reached a different conclusion as to that, the plaintiff would still be precluded from recovering by reason of his own negligence.

Judgment affirmed; the appellant to pay the costs.

BRESEE *et al.* v. LOS ANGELES TRACTION CO *et al.*

(Supreme Court of California, April 5, 1906. Rehearing Denied May 4, 1906.)

[85 Pac. Rep. 152.]

Appeal—Review—Scope of Review.—That the trial court limited the ground on which a new trial was granted does not deprive the Supreme Court of the right to review on appeal any of the grounds on which the new trial was asked, except that of the sufficiency of conflicting evidence to support the verdict.

Negligence—Evidence—Admissibility.—Where the negligence of a person on a particular occasion is in issue it is usually permissible to prove every fact known to such person at the time which would

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have a reasonable tendency to increase or decrease the danger of a particular course of action.

Same—Imputed Negligence—Negligence of Driver of Vehicle Imputable to Occupant Thereof.*—Though a person who is injured while riding in a vehicle driven by another is not chargeable with the contributory negligence of the driver in which he did not participate, yet he is not absolved from all personal care, but must exercise ordinary care to avoid all injury.

Street Railroads—Injuries to Travelers on Street—Collisions—Contributory Negligence—Evidence.—In an action against a street railway company for injuries received by plaintiff while riding in a vehicle driven by another in consequence of a collision with a car, evidence of the habits of the driver of the vehicle with respect to the dangers arising from collisions with cars, coupled with proof of knowledge thereof on the part of plaintiff, is admissible on the issue of his contributory negligence.

Same.—Where, in an action against a street railway company for injuries received by plaintiff while riding in a vehicle by another in consequence of a collision with a car, it was not claimed that the accident was attributable to the driver's lack of control over the horse due to his manner of holding the reins, evidence of the driver's habits of driving with a loose rein was inadmissible on the issue of plaintiff's contributory negligence.

Appeal—Review—New Trial—Discretion of Lower Court.—The granting of new trial in an action for an injury received by plaintiff while riding in a vehicle driven by another, in consequence of a collision with a street car, on the ground of error in admitting evidence of the driver's habits of driving with a loose rein, will not be disturbed on appeal, though the evidence was of slight importance, since the trial court has a large discretion in the matter of granting new trials.

Street Railroads—Injuries to Traveler—Collisions—Evidence—Instructions.—Where, in an action against a street railway company for injuries received by a traveler in a collision with a street car, the evidence showed that the car at the time of the accident was running at a high rate of speed and greatly in excess of the speed limited by a municipal ordinance, it was error to charge that it was not negligence on the part of the motorman to assume that a person would not attempt to cross the track in front of the approaching car so near as to render a collision probable, it being for the jury to determine whether the speed of the car was so great that he should have assumed that persons might ignorantly attempt to cross so near as to make a collision probable.

Same—Negligence.†—Running a street car at a speed in excess of the rate fixed by a municipal ordinance is negligence as a matter of law, and renders the street railway company liable for any injury caused by the excessive speed.

Same—Instructions.—Where, in an action against a street railway company for injuries received by a traveler in a collision with a car,

*For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714; foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168.

†For the authorities in this series on the question whether the violation of an ordinance limiting speed is negligence, see foot-notes appended to *Louisville & N. R. Co. v. Martin* (Tenn.), 18 R. R. R. 413, 41 Am. & Eng. R. Cas., N. S., 413; foot-notes appended to *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 18 R. R. R. 737, 41 Am. & Eng. R. Cas., N. S., 737; foot-notes appended to *Pittsburgh, etc., Ry. Co. v. Lightheiser* (Ind.), 18 R. R. R. 176, 41 Am. & Eng. R. Cas., N. S., 176.

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the evidence showed that the car was running at a rate of from 25 to 30 miles an hour, while the maximum speed was limited to eight miles an hour and the injury complained of was directly caused by the impact of the traveler's body against the ground, an instruction that if injuries to the traveler would have resulted though the car had been operated at a speed not in excess of eight miles per hour, then any rate of speed in excess of eight miles per hour was not the proximate cause of the collision and the company was not liable, was erroneous, for whatever additional injury to the traveler was due to the excess of speed was an injury caused by the company's negligence.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Paul Bresee and another against the Los Angeles Traction Company and another. From an order granting a new trial after verdict for defendants, they appeal. Affirmed.

E. E. Millikin, for appellants.

J. L. Murphy, for respondents.

SHAW, J. This is an action by the plaintiffs to recover damages for injuries to the plaintiff Ada Bresee, alleged to have been caused by the negligence of the defendants. Paul Bresee is the husband of Ada Bresee, and is made a party solely for that reason. The wife will hereafter be referred to as the plaintiff. The plaintiff was riding in a two-seated canopy top carriage, driven by P. F. Bresee, along Hill street in the city of Los Angeles, at about 10 o'clock at night, and in crossing the track of the defendant company a car, under the management of the defendant Majonnier as motorman, ran against the carriage and threw the plaintiff with great force and violence to the ground, and thereby severely bruised and injured her. The particular negligence charged against the defendants in the complaint is that the car was being propelled along the street at an unlawful, excessive, and reckless speed. The answer pleads contributory negligence on the part of the plaintiff. The jury having returned a verdict for the defendants, the plaintiffs moved for a new trial on the minutes of the court, and in the notice of intention so to do set forth a number of grounds, embracing errors in rulings upon evidence and in giving and refusing of instructions, and that the evidence in several particulars was insufficient to sustain the verdict. The motion was granted, and from the order the defendants appeal.

The order granting the new trial is in the following words: "The motion of plaintiffs for new trial is granted on the ground that evidence relating to Dr. F. P. Bresee's habits of driving on occasions other than that of the accident was improperly admitted, opinion filed." It is contended by the defendants that the limitation expressed in the order excludes from our consideration the sufficiency of the evidence upon any and every point upon which it is conflicting. The order, it will be seen, does not expressly declare that the motion was denied, so far as it was

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based on other grounds than those mentioned therein, and, therefore, it does not affirmatively exclude the other grounds from our consideration. In *Kauffman v. Maier*, 94 Cal. 277, 29 Pac. 481, 18 L. R. A. 124, it was said upon this subject: "If the trial court in its order granting a new trial, excludes this as a ground of its action *by direct language*, and the record shows that there was a conflict of evidence," this court will not re-examine the evidence. (The italics are ours.) In that case the lower court did, by direct language, exclude the ground that the evidence was insufficient and declared that, so far as that ground was concerned, the motion was denied, and hence the decision is not a precedent for the present case, where this ground, if excluded at all, is excluded by implication only, and by force of the rule "*expressio unius est exclusio alterius*." We do not find it necessary to decide whether or not the order in question should be construed to prevent a review of the evidence by this court. It is the established rule of practice that such an order, even if it is expressly limited to a single ground, does not exclude from review on appeal any of the grounds upon which the new trial was asked, except that of the sufficiency of conflicting evidence to support the verdict or decision. *Kauffman v. Maier*, supra; *Thompson v. California Con. Co.* (Cal. Sup.) 82 Pac. 367; *Simon Newman Co. v. Lassing*, 141 Cal. 175, 74 Pac. 761; *Swett v. Gray*, 141 Cal. 69, 74 Pac. 439; *Siemens v. Oakland, etc., Ry.*, 134 Cal. 496, 66 Pac. 672; *People v. Castro*, 133 Cal. 12, 65 Pac. 13; *Newman v. Overland, etc., Co.*, 132 Cal. 74, 64 Pac. 110; *Churchill v. Flournoy*, 127 Cal. 362, 59 Pac. 791. It is conceded on both sides that the plaintiff was a mere guest of P. F. Bresee at the time of the accident, and had neither the control of, nor the right to control, the driving of the carriage, and that the driver, P. F. Bresee, was a careless driver with respect to the act of passing in front of cars while driving about the streets, that he had a disposition to cross tracks in front of and dangerously near to approaching cars, that she knew his character in that respect, and that, so knowing, she did not look to see if a car was approaching when she saw that he was about to cross the track, or, if she saw it, did not warn him, nor make an effort to have him desist from the attempt, or, that she did not make the extra effort in these particulars that ordinary care demanded of her, in view of her knowledge of his careless character, that if she had made such effort he would have been deterred from crossing and she would have been unhurt, and hence, that her own lack of care contributed to her injury.

The evidence on this question, referred to in the order granting a new trial, consisted of testimony to the effect that P. F. Bresee had been for many years almost constantly driving about the city with the same horse and carriage, that on five occasions prior to the accident he had been seen to drive in front of cars so near thereto that the witnesses testifying considered it carelessly and dangerously near, that he usually drove with a loose rein and held the reins loosely in one hand, frequently driving

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with his head down, or turned to the rear conversing with others riding with him, and that he did not seem to be observant of other cars or vehicles approaching him. This evidence was not introduced for the purpose of proving that P. F. Bresee negligently drove in front of the car on the occasion of the accident. The defendants relied on other evidence to prove that fact, and so stated to the court. The question of its admissibility for that purpose, is, therefore, not involved, and this must be kept carefully in mind. It was offered and admitted expressly for the purpose of showing the character of P. F. Bresee as a careless driver. In that connection, and in order to make it relevant, it was further proposed by the defendants to show that plaintiff, at the time, knew, or should have known, his character in that respect. It is first to be noted that the cases on the subject of the introduction of such evidence of character or previous habits to prove the fact of negligent driving on the occasion of the accident are not applicable to the question now under consideration. Upon that question there is much confusion and considerable conflict in the authorities. We think the admissibility of the evidence, for the purposes for which it was here offered, depends upon different conditions and upon a difference in the issue to which it is directed.

The purpose of the evidence was to lay a foundation for the application of the familiar rule that the degree of care necessary to constitute the ordinary care required of a person upon any particular occasion, is measured by reference to the circumstances of danger and risk known to such person at the time. When the negligence of a person upon a particular occasion is in issue, it is usually, if not always, permissible to prove every fact, known to such person at the time, which would have a reasonable tendency to increase or decrease the risk and danger of a particular course of action. There are numerous instances of the application of this rule which are somewhat analogous to the case at bar, though we have not found any case precisely to the same point. Thus, vicious habits of an animal may be proven to show that it was negligence to allow it to go at large or unmuzzled, and particular exhibitions of such viciousness, of which the owner has knowledge, may be shown as evidence of the vicious disposition and of the neglect in issue. *Judd v. Claremont*, 66 N. H. 419, 23 Atl. 427; *Lynch v. Richardson*, 163 Mass. 160, 39 N. E. 801, 47 Am. St. Rep. 444; *Muller v. McKesson*, 73 N. Y. 199, 29 Am. Rep. 123; 1 Wigmore on Evidence, § 251. And lack of skill of an employee, and particular instances thereof, may be shown, coupled with knowledge thereof by the employer, to prove negligence of the employer in hiring or retaining him. *Pittsburg, etc., Co. v. Ruby*, 38 Ind. 312, 10 Am. Rep. 111; *Mich. Cent. R. R. v. Gilbert*, 46 Mich. 179, 9 N. W. 243; *Davis v. R. R. Co.*, 20 Mich. 120, 4 Am. Rep. 364; 1 Wigmore on Evidence, §§ 208, 250. Although the rule is, as conceded here, that the person who is injured while riding in a vehicle driven by another is not chargeable with the contributory

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negligence of the driver, in which he did not participate, yet such person is not absolved from all personal care, but is required to exercise ordinary care to avoid injury. *Dean v. Penn. R. R. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Brickell v. N. Y. Cent. R. R.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *Nesbit v. Garner*, 75 Iowa 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486; 1 *Shearman & R. on Neg.* § 66a. The character and habits of the driver of the carriage with respect to similar dangers, if known to the plaintiff, would naturally have some effect on her own conduct, on the particular occasion in keeping a lookout for the danger herself, in giving him warning, and in enjoining on him a prudent course, and in order to enable the jury to determine whether or not she exercised ordinary care in that respect, it was proper to give evidence of such character and habits, coupled with proof of knowledge thereof on her part. These observations and conclusions, however, are not applicable to the evidence of the driver's previous habits of driving with a loose rein, or of holding the reins loosely in one hand. These habits would not tend to prove either a careless habit of driving in front of cars too close for safety, or a disposition to do so. It was not claimed that the accident was attributable to his lack of control over the horse due to his manner of holding the reins. This evidence was not pertinent to any issue in the case and was improperly admitted. Although it was probably of slight importance, yet, in view of the large discretion committed to the judge of the trial court in the matter of granting a new trial, we cannot say it was not properly granted on that ground. We do not consider it necessary to consider the question of the sufficiency of the evidence to show plaintiff's knowledge of the driver's habits and character and of the particular instances of his negligence. Upon another trial the court can, if deemed best, direct the order of proof so that the evidence of such knowledge on her part shall be first introduced, and if no sufficient evidence to go to the jury is offered on that point, or in respect to some of the instances, the corresponding evidence thereof can be excluded.

At the request of the defendant the court instructed the jury with respect to the conduct of the motorman that: "It is not negligence on the part of such motorman to assume that a person will not attempt to cross the track in front of an approaching car, which is so near as to render a collision probable." The probability of a collision between a moving car and a vehicle crossing in front of it, depends largely upon the speed of the car, and the action of a careful person attempting to cross, in choosing the distance at which to cross in front of such car, will depend upon his knowledge, and means of knowledge, of the speed with which the car is approaching him. There was evidence strongly indicating, if not absolutely demonstrating, that the car in question at the time of the accident was running at a speed of at least 25 or 30 miles an hour. This was in the night-

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time and upon a street in the thickly settled portion of the city. With the car going at such tremendous speed, it is not unlikely that persons about to cross the track might choose a place so near as to make collision probable, and yet, from their point of view, it might seem entirely reasonable and safe for them to cross at the place selected. Their failure to perceive the danger might be entirely due to the excessive speed of the car, and to their inability in the darkness to detect it and comprehend the shortness of the time required for the car to pass over the distance between it and the place selected for the crossing. The motorman must be assumed to know approximately the speed of his car. Under such circumstances, and while running at such excessive speed, it cannot be said as a matter of law, that the motorman ought not reasonably to have expected that persons might attempt to cross the track at a point which would in fact be dangerously near, but which to them would not appear so. The circumstances might be such as to charge him with knowledge of this likelihood. Due care would require him in that case to anticipate such probability reasonably arising from the consequences of his own gross carelessness. The court, therefore, should not have stated as a matter of law that the motorman, under the circumstances had a right to assume that persons would not cross dangerously near in front of him. It should have been left to the jury to say whether or not his speed was so great that he should have assumed that persons might ignorantly attempt to cross so near as to make a collision probable.

The court also, at the request of the defendants, instructed the jury with respect to the proximate cause of the injury, as follows: "If you believe from the evidence that said collision, and the injuries so sustained by said Ada Bresee, would have resulted, even had said car been operated at a rate of speed not in excess of eight miles per hour at the time the vehicle in question was turned to cross the railway tracks, then any rate of speed in excess of eight miles per hour that said car may have been running at said time, was not a proximate cause of said collision, and can not render the defendants liable in this action." This instruction implies a fact not physically possible, namely, that an injury caused by being thrown with great force and violence from the carriage to the ground would have been as great if the force and violence had been less than it actually was, the other circumstances being precisely the same. The action of force and violence, other things being the same, is mechanical and absolute, and it is impossible that different degrees of force should produce the same results, where all other circumstances are precisely the same. So far as the mere fact of the collision was concerned, it may be that, although the speed of the car was more than eight miles an hour, it would have occurred had the speed been less. The injury complained of, however, was alleged to have been directly caused by the impact of the plaintiff's body against the ground, and its extent would necessarily depend upon

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the force of the impact, and that force would depend on the speed of the car. Any increase in the speed would, necessarily, add to the force and, consequently, to the extent of the injury. At the time this accident happened it was unlawful to propel a street car along the streets of the city at a rate exceeding eight miles an hour, and a speed in excess of that rate constituted negligence, as a matter of law, and rendered the party operating the car liable for any injury caused by such excessive rate. Whatever additional injury, therefore, was due to the excess of speed over eight miles an hour, was an injury caused by the defendants' negligence. The excess in the speed over that rate, an excess which is assumed by the instruction in question, must have been the direct cause of such additional injury. This additional injury from such negligence would render the defendants liable in the action, in the absence of plaintiff's contributory negligence. If the instruction had been limited to the happening of the collision alone, it might not have been objectionable in this respect, although even in that case it is metaphysical in form and would have tended to confuse the jury. But in the assertion that, under the circumstances stated, the excess of speed could not render the defendants liable in the action, it was erroneous. In either event it should not have been given.

The order is affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.

TOLEDO, ST. L. & W. R. Co. v. GORDON.

(Circuit Court of Appeals, Seventh Circuit, January 2, 1906.)

[143 Fed. Rep. 95.]

Railroads—Removal of Trespassers from Trains—Measure of Care Required.*—The only duty owing by those in charge of a railroad train to one who is on the train without right is to abstain from wanton and reckless injury to him, when rightfully expelled; but that duty is imperative, and whether or not it was observed in any case depends upon all of the circumstances involved, and is a question for the jury, where the material facts are in dispute under the evidence.

Same—Action for Injury to Trespasser—Instructions.—Instructions considered and approved, in an action against a railroad company to recover damages for the injury of plaintiff by being expelled by

*For the authorities in this series on the subject of the care due trespassers on trains, see foot-notes appended to *Bjornquist v. Boston & A. R. Co.* (Mass.), 13 R. R. R. 786, 36 Am. & Eng. R. Cas., N. S., 786; *Albert v. Boston Elev. Ry. Co.* (Mass.), 13 R. R. R. 779, 36 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Powell v. Erie R. Co.* (N. J.), 13 R. R. R. 615, 36 Am. & Eng. R. Cas., N. S., 615; foot-notes appended to *Jordan v. Grand Rapids & I. Ry. Co.* (Ind.), 13 R. R. R. 397, 36 Am. & Eng. R. Cas., N. S., 397; *Monehan v. South Covington & C. St. Ry. Co.* (Ky.), 12 R. R. R. 671, 35 Am. & Eng. R. Cas., N. S., 671.

For the authorities in this series on the subject of the liabilities of

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the conductor from a moving train of defendant in the night while passing over a trestle, plaintiff being on the train without right, where they in effect charged that to entitle him to recover he must prove by a preponderance of evidence that, while the train was passing over a dangerous portion of the road, which was not known to plaintiff, the conductor, knowing that fact, willfully and wantonly ejected plaintiff or compelled him to jump from the train by commands or threats or demonstrations of violence, such that a reasonably prudent man in a like situation would have yielded to them.

Same—Exemplary Damages.†—A railroad company cannot be held liable in punitive damages for the willful and wanton act of a conductor in wrongfully ejecting a trespasser from one of its moving trains in a dangerous place causing his injury, where the company neither authorized nor ratified the act; and the fact that the conductor was not discharged prior to the trial of an action brought by the injured person to recover damages is not sufficient to constitute a ratification.

In error to the Circuit Court of the United States for the Southern District of Illinois.

The defendant in error, George Gordon, was the plaintiff below and recovered verdict and judgment against the Toledo, St. Louis & Western Railroad Company, plaintiff in error, in an action on the case for personal injuries, caused by expulsion from a railroad train. This writ of error is brought thereupon, and the alleged errors which are relied upon for reversal are (1) refusal of the court to direct a verdict of not guilty, (2) refusal of instructions requested by the plaintiff in error, and (3) an instruction to the jury that punitive damages could be awarded.

The declaration contained five counts, but the court sustained a demurrer to three and withdrew another from consideration as unsupported by the evidence—thus withdrawing all counts which were predicated on the relation of passenger upon the train—and the case was submitted to the jury under the fifth count only, which charges, in effect, wanton and malicious expulsion from the train, with violence, while crossing a trestle in darkness, and willfully causing the injuries sustained by the defendant in error. In other words, the issues were submitted in the view that the injured party was on the train without authority and not entitled to carriage.

The defendant in error, with five other men, returning from the State Fair, arrived at Cowden Junction too late to catch a passenger train for Lerna, their destination. The night was dark and rainy, and they waited in a lumber shed about an hour, when a freight train on the road of the plaintiff in error slowed

a railroad company for the ejection of a trespasser from a train in an improper and reckless manner, see foot-notes appended to *Dixon v. Northern Pac. Ry. Co.* (Wash.), 14 R. R. R. 619, 37 Am. & Eng. R. Cas., N. S., 619; foot-notes appended to *McKeon v. New York, etc., R. Co.* (Mass.), 8 R. R. R. 375, 31 Am. & Eng. R. Cas., N. S., 375.

†For the authorities in this series on the question as to when punitive or exemplary damages are, and are not, recoverable against a railroad company on account of the acts or omissions of its employees, see foot-note appended to *Chicago Union Traction Co. v. Lauth* (Ill.), 17 R. R. R. 606, 40 Am. & Eng. R. Cas., N. S., 606.

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up for the crossing, bound in the direction of Lerna, and the party entered upon the platforms of the caboose, Gordon and another at the rear platform, and the others at the front. They were discovered by the trainmen, soon after passing the crossing but the testimony is conflicting as to the terms of the altercation and violence used in the expulsion of Gordon; or, as stated in the brief for the plaintiff in error, "there is a wide divergence between the stories of Gordon and his witnesses and that of the" trainmen. These facts, however, are well established: That the conductor insisted upon their jumping from the train while in motion and refused to stop to let them off; that the night was extremely dark and stormy; and that the expulsion of the defendant in error occurred upon a high trestle, causing his fall and serious injury. The conflict is in reference to details of the insistence—the extent of violence in language, threats, or force, rather than the facts of command and threat. On behalf of the defendant in error the testimony plainly tends to prove that the conductor was extremely violent in language and threats, from which physical violence was apprehended, at least, in the expulsion of Gordon; that it was too dark for the latter to discover, and he did not know, that the train was on or near the trestle; and, that he jumped from the step in fear of actual force on the part of the conductor, supposing the place to be reasonably safe and on the level.

The instructions refused and given, on which error is assigned, are sufficiently mentioned in the opinion.

Chas. A. Schmettau, for plaintiff in error.

James Vanse, Jr., for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The primary contention, that the plaintiff in error was entitled to a peremptory instruction in its favor, is untenable, as we believe, in any view of the issues of fact under the rule which governs the expulsion of any person from a railroad train when no contract duty exists. In the absence of the relation of carrier and passenger, it is well settled that the only duty then owing one who is on the train without right is "to abstain from wanton or reckless injury to him" (*Purple v. Union Pacific R. Co.*, 51 C. C. A. 564, 114 Fed. 123, 129, 57 L. R. A. 700), when rightfully expelled, but that duty is imperative. Whether it is justly observed in any case depends upon all the circumstances involved—the conditions under which removal was imposed, and not alone the extent of violence in its enforcement. When an issue of fact fairly arises under the testimony, whether the conduct on the part of the railroad company was wanton and reckless in expelling a trespasser from the car, willfully exposing him to imminent danger and harm, the solution is for the jury under proper instructions and not for the court. It is true that another issue may arise in such case, in reference to the conduct

of the injured party, whether, without physical compulsion, he may not have acted voluntarily, and assumed the risk of jumping from the car, in the face of recognized danger (*vide* *Bosworth v. Walker*, 27 C. C. A. 402, 83 Fed. 58), which is equally a question of fact for the jury, if the testimony is not conclusive one way or the other. Without needless comment on the testimony in the present record, we deem it sufficient to remark that neither version of the transaction authorized a directed verdict in favor of the plaintiff in error.

The instructions under which the case was submitted to the jury, upon the issue of the alleged willful and wanton conduct on the part of the conductor, clearly defined that issue, and are not open to complaint on the part of the plaintiff in error. A single exception, which is preserved to that portion of the charge, in reference to the authority of the conductor, is plainly without merit.

Upon the further issue, the instructions do not specifically define what may constitute a voluntary act of the injured party and assumption of risk, but the jury were instructed, in plain and repeated terms, that the burden of proof was upon the plaintiff (below) to establish all the allegations; and it was specifically stated that he must prove by the preponderance of evidence "that while the train was moving over a dangerous portion of the road, the conductor, knowing that fact, willfully and wantonly ejected the plaintiff from the train, the plaintiff not knowing the danger of the location," to authorize a verdict in his favor; also that the proof must establish "that the conductor here knew of the trestle and the plaintiff did not know of the dangerous location of the train, and the conductor compelled the plaintiff to jump off by commands or threats or demonstrations of violence, and that those commands or threats or demonstrations of violence were such that a reasonably prudent man in a like situation would have yielded to them and would have jumped off." We are satisfied that no reversible error was committed in this branch of the instructions, and that the jury were well advised and cautioned for their consideration of the evidence, under these issues, or in any view of the burden of proof, without prejudice to the plaintiff in error.

In reference to the several instructions requested on behalf of the plaintiff in error and denied by the court, aside from one relating to exemplary damages, to be considered separately, discussion in detail is deemed unnecessary. Those pressed for consideration, which are not plainly covered by the general instructions, are numbered 3, 4, 5, 7, 10, and 15. Of the first five, it is sufficient to remark that each relates to the act of the plaintiff in error in jumping from the car, and instructs, in effect, that he cannot recover if his act was voluntary. No. 3 instructs against recovery, if warned by the conductor not to get off while on the trestle, and No. 4 that, even if told to get off, he would not be justified in doing so on the trestle, but had the right to disobey such order, when compliance exposed him to obvious danger.

No. 5 instructs that, if he knew, or exercising reasonable care could have known of the peril, he was not bound to obey the command; and, unless he thus left the train, justified in fearing and in actual fear of a vicious assault, he could not recover for the injury. No. 7 defined obedience to such command, when the danger of obeying is perceived and obvious, as "essentially a voluntary act" for the consequences of which there can be no recovery. No. 10 instructs that he could not recover, though ordered to leave, if "it was optional with him whether to get off or not," and he deliberately made the attempt. Upon these requests a general observation sufficiently supports the ruling of the trial court. In so far as either assumes to instruct that Gordon was not entitled to recover, if he was warned or was chargeable with knowledge of the danger incurred, such instruction was fully covered by the general charge. The further requests, defining, in the language of authorities cited, voluntary action which would defeat recovery, if given without modification adapted to the evidence, would tend to mislead the jury, and their refusal was not erroneous. With the jury expressly instructed that the defendant in error must fail of recovery, unless the preponderance of evidence established, not only that he was compelled by the conductor to jump from the moving car, when the night was dark and stormy, but that the conductor knew they were on the dangerous trestle and the defendant in error did not know "the danger of the location," surely the utmost burden authorized under the rules was thus discharged. Whether the command to leave the train was accompanied with physical force does not impress us to be essential under the issue of fact thus framed and found by the verdict, and we are of opinion that error is not well assigned for denial of such requests; nor for denial of request No. 15, which was sufficiently included in the general charge.

The remaining question for review arises upon request No. 21, for an instruction that exemplary damages cannot be recovered, and the instruction which was given instead, that the jury were entitled, in their discretion, to award "punitive damages." Under the decision in *Lake Shore, etc., Ry. Co. v. Prentice*, 147 U. S. 101, 107, 13 Sup. Ct. 261, 37 L. Ed. 97, the instruction so given was erroneous and presumptively harmful. In this court the rule thus settled is exemplified and followed in *Pittsburgh, C., C. & St. L. Ry. Co. v. Russ*, 6 C. C. A. 597, 57 Fed. 822, 826. Also, see, notations in 12 Notes U. S. Rep. 297. As remarked in the leading authority first mentioned, the decisions contra in various state courts are disapproved, and this rule is adopted: The principal must respond in full compensatory damages for injury wantonly caused by an agent in the line of his employment, but not for exemplary damages, unless the wrongful act in question was authorized or ratified by the principal. Comment on the line of cases thus disapproved is unnecessary, and it is not open to question that the allowance of exemplary damages was reversible error. It would, indeed, be a harsh rule—harsh

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in its effect on all employees—that would hold a railroad company to have ratified the employee's act merely because before trial the employee was not discharged. Such rule would put their continued employment in jeopardy every time an accident occurred, not because the employee was shown to have been guilty of wanton conduct, but because the railway company stood in danger that wantonness might be established. In reference to the case of *Bass v. Chicago & Northwestern Ry. Co.*, 42 Wis. 654, 669, 672, 24 Am. Rep. 437, cited as supporting the instruction, within the doctrine of ratification, it may well be remarked that no such issue of fact was submitted to the jury by this instruction, as in that case; and were it assumed, without so intimating, that the peculiar circumstances which there appeared, including two prior trials, were sufficient evidence of ratification to uphold the verdict, nevertheless the evidence in the present record is plainly insufficient to establish, as a conclusion of law, that the alleged wanton acts of the conductor were ratified by the plaintiff in error.

The judgment is reversed, for error in such instruction, and the cause remanded for a new trial.

CHICAGO, M. & ST. P. RY. CO. v. LINDEMAN.

(Circuit Court of Appeals, Eighth Circuit, March 10, 1906.)

[143 Fed. Rep. 946.]

Customs and Usages—Custom Must Be Uniform, Known, Certain, or Notorious—Facts Held Insufficient to Establish.—A custom must be uniform, certain, and known, or so notorious that a person of ordinary prudence, in the exercise of reasonable care, dealing with its subject, would have been aware of it.

Where the plaintiff's witnesses testify that there was a custom of doing an act in a certain way and that they followed this custom, and defendant's witnesses testify that they performed the act at the same place during the same time in another way, and no witness contradicts the testimony of the latter or testifies that the alleged custom mentioned by the plaintiff's witnesses was either uniform or universal, it is held that the evidence is insufficient to warrant a finding by a jury that the alleged custom was uniform, and hence the question of its existence should not have been submitted to them.

Damages—Future Pain Must Be Reasonably Certain to Authorize Recovery—Those Which May Result Are Not Recoverable.*—The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such pain and other evil effects as are reasonably certain to result from it. Possible, even probable, future effects are too remote and speculative to form the basis of legal recovery.

A charge that the plaintiff may recover damages for pain and suffering which may result from the injury in the future is erroneous. (Syllabus by the Court.)

*For the authorities in this series on the subject of the right to recover on account of future suffering, in actions for personal injuries, see foot-notes appended to *Normile v. Wheeling Traction Co.* (W. Va.), 18 R. R. R. 235, 41 Am. & Eng. R. Cas., N. S., 235.

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In error to the Circuit Court of the United States for the Western District of Missouri.

Frank Hagerman (*H. H. Field* and *Burton Hanson*, on the brief), for plaintiff in error.

W. F. Guthrie (*L. C. Boyle*, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. In the yards of the defendant below at Kansas City, Mo., there was a level platform 15 feet above the ground and 217 feet long and a trestle 293 feet long upon a grade of 5 3-10 per cent. which extended from the platform to the ground. On this platform and trestle there was a railroad which extended into the yards and was connected with other railroads. A short distance from the foot of the incline there was a switch, by means of which an engine or a car could be turned from the railroad track which extended from the platform past the switch into the yard. The platform and trestle were constructed and used for the purpose of unloading coal from cars into chutes provided for that purpose. Two empty coal cars stood upon the platform which the yardmaster had directed the plaintiff below and three of his fellow servants to "drop" down from the platform into the yard. Empty cars were "dropped" in this way: An engine was coupled to the cars which drew them out over the summit of the incline to such an extent that they could be held there by their brakes, but would, when the brakes were released, be drawn down the incline and sent along the track into the yard by gravity. When cars had been drawn to the proper place, the engine was uncoupled, moved down the incline, and sent upon another track by means of the switch, and as soon as the engine has passed the switch was closed, notice was given to the field brakeman upon the cars who released the brakes, and the cars were then dropped down the incline and passed out into the yard.

On May 23, 1903, Gage, the engineer, Smith, a switchman, whose place was upon the engine, and the plaintiff, whose station was on the top of the cars, undertook to drop two cars into the yard. The engine was coupled to them, drew them upon the summit of the incline, stopped and was uncoupled, the plaintiff set one brake on the leading car, and notified the switchman, Smith, upon the engine to take it away. The engineer and Smith started the engine slowly down the incline, but the brake upon the car did not hold them, and they followed the engine. As soon as Smith saw that the cars were coming he signaled to the engineer to stop, and he did so. Meanwhile the plaintiff, who had been standing on the top of the leading car, had started toward the rear car to set another brake, and as he was stepping from one car to the other they struck the engine and he was thrown between the cars by the impact and injured. He sought to recover damages of the company for the negligence of Gage

and Smith under the statute of Missouri which charges railroad companies with liability for the carelessness of fellow servants. His principal charge was that they violated a custom of stopping the engine after it was uncoupled and had moved from two to four feet away from the cars and holding it there until the question whether or not the brakes would hold the cars was determined by actual trial. The defendant denied the existence of this alleged custom, and the evidence upon this issue was this: The plaintiff testified that he had assisted in dropping cars from the platform 15 or 20 times and that such a custom existed. Metler, who had been foreman of the switching crew in the yard for many years, testified in this way:

“Q. Who cuts the engine off from the cars? A. The man following the engine. The engine slacks away, and he sits in sight there.

“Q. Who? A. The man following the engine.

“Q. What does he sit there for? A. Watching the cars.

“Q. What does the engine do during this time? A. It slacks ahead and stops.

“Q. How far does it slack ahead? A. Three or four feet.

“Q. I will get you to state, whether this thing is done the same way day and night—or different. A. The same way day and night.”

On the other hand, Smith, the switchman, testified that he probably had taken cars down this incline 50 or 75 times, that the engine never stopped after it was uncoupled at any time when he was assisting, but that it went on slowly down the incline unless the cars started. Gage, the engineer, testified that he had taken cars down from this platform four or five times and had seen them dropped frequently, that every time he had ever seen it done the engine was uncoupled and then taken slowly down the incline, and that he moved it in the usual way at the time of the accident. Fitzgerald, another engineer, testified that he had worked in the yards six or seven years, that he estimated that he had taken cars down from that platform 2,000 or 3,000 times, and that he never stopped his engine after uncoupling, and never knew it to be stopped unless the brakes on the cars failed to hold. Williams, a foreman of a switching crew, who had worked in this yard 12 years and had assisted to take cars down from this platform probably 500 times, testified that he never knew an engine to stop on the incline after it was uncoupled unless the cars started. Black, an engineer, testified that he had worked four or five years in the yards and had taken cars down from that platform several hundred times, that he had pulled the empties out over the summit of the incline so that they would run down, then cut the engine off and had gone down; that he had seen the engine catch cars which came down when the brakes did not hold; but that he could not remember of ever stopping to see whether or not the brakes would hold.

The court charged the jury that if they found from this evidence that there was a uniform custom for the engineer to move

his engine after it was uncoupled a short distance in front of the leading car and then wait and ascertain whether or not the brakes held, and, if they did not, to receive the impact of the cars, and, if they did hold, then to proceed on out of the way of the cars, and that the engineer, Gage, and the switchman, Smith, violated this custom at the time of the accident, they were guilty of negligence which, if causal, might entitle the plaintiff to a recovery. An exception was taken to this ruling, and it is specified as error. A custom has the force of law, and furnishes a standard for the measurement of many of the rights and acts of men. It must be certain or the measurements by this standard will be unequal and unjust. It must be uniform; for, if it vary, it furnishes no rule by which to mete. It must be known, or must be so uniform and notorious that no person of ordinary intelligence who has to do with the subject to which it relates and who exercises reasonable care would be ignorant of it; for no man may be justly condemned for the violation of a law or a custom which he neither knows nor ought to know. In short, a binding custom must be certain, definite, uniform, and known, or so notorious that it would have been known to any person of reasonable prudence who dealt with its subject with the exercise of ordinary care. *U. S. v. Buchanan*, 8 How. 83, 102, 103, 12 L. Ed. 997; *Bowling v. Harrison*, 6 How. 248, 259, 12 L. Ed. 425; *Collings v. Hope*, Fed. Cas. No. 3,002; *Parrott v. Thacher*, 9 Pick. (Mass.) 426, 431; *York v. Wistar*, Fed. Cas. No. 18,141; *Greenwich Ins. Co. v. Waterman*, 54 Fed. 839, 842, 4 C. C. A. 600, 603; *Robinson v. U. S.*, 13 Wall. 363, 366, 20 L. Ed. 653; *Jones v. Hoey*, 128 Mass. 585, 587.

The record in this case fails to disclose substantial evidence of one of the elements of a custom of this nature—its uniformity. Two witnesses, one of whom had taken cars down from this platform only 15 or 20 times, testified that there was such a custom, and that cars had been dropped in conformity to it. Neither of them testified that this custom either uniformly or universally prevailed, or that there was not a custom equally well established to drop them without stopping the engine after it was uncoupled to ascertain whether or not the brakes would hold the cars. Five witnesses testified that they had taken cars down from this platform thousands of times and that they had never stopped an engine or seen it stopped on the incline after it was uncoupled unless the cars started and it stopped to catch them, and that they neither knew nor followed the alleged custom of the plaintiff's witnesses. No one came to contradict the testimony of any of these five witnesses or to say that they had not taken down cars without stopping the engine upon the incline in the way and to the extent to which they had testified. The result was uncontradicted evidence that the custom to which the witnesses for the plaintiff testified was not uniform, and hence that it was not binding. Moreover, because it was not shown to be uniform it had not that notoriety which could charge the engineer and the switchman with notice of it, and as there was no evidence that

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they were actually aware of it the proof of the custom failed to show the knowledge or notoriety sufficient to sustain the custom. The question of the existence of the custom should not have been submitted to the jury.

Another specification of error is that the court instructed the jury that the plaintiff was entitled to recover for such pain and suffering caused by the injury as he "may in the future suffer." In *Chicago & N. W. Ry. Co. v. De Clow*, 124 Fed. 142, 143, 145, 61 C. C. A. 34, 35, 37, in which this court had occasion to consider the rule applicable to this question, it said:

"The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects of the act as are reasonably certain to result from it. Possible, even probable, future damages are too remote and speculative to form the basis of legal injury. If they may or subsequently do result from the accident, they are but a part of that *damnum absque injuria* which reaches too far into the realm of conjecture to form any part of the basis of an action at law. *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 42, 45; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534, 542, 75 Am. Dec. 258; *Fry v. Railway Co.*, 45 Iowa, 416, 417; *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 541, 21 N. W. 524, 50 Am. Rep. 154; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 380, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 368, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912; *Ford v. City of Des Moines*, 106 Iowa, 94, 97, 75 N. W. 630; *Chicago, R. I. & Pac. R. Co. v. McDowell (Neb.)* 92 N. W. 121."

The charge of the court upon this subject was not in accord with this rule, and the judgment below must accordingly be reversed, and the case remanded to the court below with instructions to grant a new trial.

NORFOLK & W. RY. CO. v. GESSWINE.

(Circuit Court of Appeals, Sixth Circuit, March 17, 1906.)

[144 Fed. Rep. 56.]

Master and Servant—Injuries to Servant—Negligence—Proximate Cause.*—To justify a recovery by the administrator of a trackman for death suffered while repairing the track, from collision with a passing train, it is indispensable that the proximate cause of the injury be shown to be the neglect by the railroad company of some duty to him in respect to his protection from injury by passing trains.

Same—Instructions.†—In an action for death of a brakeman by collision with a passing train as he was repairing the track, an instruction that his place of employment was a dangerous place, and that, if

*See generally, extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

†See generally, foot-notes appended to *Choctaw, O. & G. Ry. Co. v. Doughty (Ark.)*, 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665.

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he was hurt while trains were being managed and operated in the usual and ordinary way, there could be no recovery, was proper.

Same—Signals.†—The custom of a railroad company to give signals for crossings, as required by Rev. St. Ohio 1892, §§ 3336, 3337, was for the sole benefit of persons using, or about to use, the crossing, so that a failure to comply with such custom did not constitute negligence of which the administrator of a trackman killed in collision with a passing train, while working near a crossing, could complain.

Same—Evidence.—In an action for death of a brakeman by being struck by a train while he was working on the track near a crossing, it was error for the court to permit a member of deceased's gang to testify that they relied on the railroad's custom to ring and whistle for such crossings to warn them of the approach of trains, when repairing track in the vicinity.

Same—City Ordinance.§—Trackmen employed by a railroad, and engaged in repairing the track are not within the protection of a city ordinance limiting the speed of trains within the corporate limits of the city.

Evidence—Hearsay—Res Gestæ.—In an action for death of a railway trackman by being struck by a train, evidence that on the morning in question witness saw the train and "talked about it running fast," not shown to have been contemporaneous with the passing of the train, was not *res gestæ*, but was inadmissible as hearsay.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This was an action for negligently running over and killing Henry Gesswine, the intestate of the defendant in error. Gesswine was a section hand in the employment of the railroad company at the time of his injury, and was engaged as one of a gang of hands in repairing the company's main track within the corporate limits of the city of Ironton, Ohio, and was run over and killed by a passing passenger train. This train was a regular train and was ordinarily on time. On this occasion it was a few minutes late, and was traveling at something greater than its usual speed when passing through Ironton. The accident occurred at 7:30 in the morning, and the men had been but a short time at work. The petition avers that the morning was very foggy, so much so that objects could not be seen until within 10 or 15 feet. It was also averred that at the point where the accident occurred the decedent's view of the track was obscured by buildings and freight cars upon adjacent tracks, and that his hearing was impeded by the noise of a switch engine

†For the authorities in this series on the question whether it is actionable negligence to have failed to give crossing signals where the accident was not at the crossing, see foot-notes appended to *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 18 R. R. R. 737, 41 Am. & Eng. R. Cas., N. S., 737.

§See foot-notes appended to *Louisville & N. R. Co. v. Martin* (Tenn.), 18 R. R. R. 413, 41 Am. & Eng. R. Cas., N. S., 413; foot-notes appended to *Pittsburgh, etc., Ry. Co. v. Lightheiser* (Ind.), 18 R. R. R. 176, 41 Am. & Eng. R. Cas., N. S., 176.

For the authorities in this series on the question whether railroad employees assume the risks from the violation of ordinances limiting the speed of trains or cars, see foot-notes appended to *Pittsburgh, etc., Ry. Co. v. Lightheiser* (Ind.), 18 R. R. R. 176, 41 Am. & Eng. R. Cas., N. S., 176.

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moving back and forth upon adjacent tracks. The track of the railroad company through the city of Ironton was crossed at right angles by a number of public streets or roads in the vicinity of the place of collision. It was averred also that the invariable habit of the company was to ring the bell and sound the whistle on approaching these crossings, and that this practice was known to deceased and relied upon as a means of warning by him when so at work upon the track in the vicinity of such crossings. It is also averred in said petition: "That, for a long time prior to and up to the date of the injuries complained of, it had been the custom of said defendant in running its trains on said track through the city of Ironton and past said crossings, and the place where decedent then was, to approach said point and crossings at a speed not exceeding 10 to 15 miles per hour, which custom was at the time well known to and relied upon by said decedent."

It is then charged that decedent, while in the discharge of his duty, under the direction and order of his section boss, was "adzing ties in a stooped position upon said main track of said defendant, without any carelessness or negligence on his part, the said defendant, in utter disregard of its duty and the safety of said decedent and other employees engaged in the line of their duty at said point, carelessly and negligently ordered and caused said decedent to proceed in his work and duty at said time and place, and in the manner above set out; and defendant then and there carelessly and negligently failed to make any protection whatever, by placing a guard, to give decedent warning of the approach of trains at said point, or take any other means for the safety of the said decedent, while in the performance of his duty aforesaid; and defendant carelessly and negligently failed and neglected to cause notice or warning to be given to said decedent by sounding the whistle or ringing the bell on said train approaching said point, as it was the custom of the defendant theretofore to do; and defendant then and there failed and neglected in any other manner to give decedent warning of the approach of its trains upon said track at that point; and then and there, while the decedent was so employed, the defendant carelessly and negligently caused and permitted a certain passenger train, pulled by two locomotives, to run upon said track approaching the point where the decedent then was, off of any schedule time of said defendant, to approach from the south, running north from Kenova, through and within the limits of the city of Ironton upon said main track where decedent then was, at a high and extraordinary rate of speed, to wit, at a speed of from 45 to 50 miles per hour, without sounding the whistle or ringing the bell upon said train, and without any notice or warning, or means of protection to said decedent; and then and there negligently and carelessly caused said train, so approaching, to rush upon and to strike the decedent, so engaged in the line of his duty as aforesaid, striking the decedent in the head and about the body, knocking him off of said track a distance of several

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feet, thereby causing injuries to said decedent from which he immediately died."

The case was submitted to a jury upon the issues joined who found for the plaintiff.

Henry Bannon, for plaintiff in error.

W. D. Jones and *R. D. Miller*, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

After having made the foregoing statement of the case, LURTON, Circuit Judge, delivered the opinion of the court.

To justify a recovery by a trackman for an injury sustained while engaged in repairing track from collision with a passing train, it is indispensable that the proximate cause of his injury shall be shown to have been the neglect by the railway company of some duty due to him in respect to his protection from injury by passing trains.

Upon this subject the circuit judge, who presided at the trial of this case, correctly stated the law, when he said:

"Now, this man was one of a number of men who were employed as section men on the railroad. They were engaged in repairing the track, taking out rails, putting in new ones, taking out cross-ties and putting in new ones, and hewing them into proper form and shape, and were working on the railroad track, while the trains were being operated in the usual way—manifestly, a place of danger. A railroad does not suspend the operations of its trains until the track can be put in order, and the proposition to these section men was, 'We will run the trains and operate the road as heretofore, as we ordinarily do, and between trains you must do this work and look out for yourselves to avoid being injured by the trains,' and the section men accept the employment upon those terms, and, if an accident occurs and they are hurt while the trains are being managed and operated in the usual and ordinary way, they can have no just ground of complaint against the railroad, it is not the fault of the railway company." *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758; *Morris v. Boston & Maine Rd.*, 184 Mass. 368, 68 N. E. 680; *Carlson v. C., S. & M. Rd.*, 120 Mich. 481; 79 N. W. 688; *Railroad Co. v. Hester*, 64 Tex. 401.

The uncontradicted evidence was that section men whose labors kept them on or about the track were expected to be alert and protect themselves against passing trains, and there was no averment in the petition of any rule or practice of the company requiring approaching trains to give warning to track repairers by either bell or whistle. If, however, the servants operating this particular train had actually discovered the deceased in a position of peril, and apparently unaware of his danger, the most elementary principles of law and humanity would have required that they should do all that the time would admit to avoid injuring him. *Kansas City, etc., Rd. Co. v. Cook*, 66 Fed. 115, 13 C. C. A. 364, 28 L. R. A. 181. There was no averment in the

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petition that the man upon this engine discovered Gesswine's danger and no evidence to bring this principle of law into application.

The plaintiff in error grounds his action upon an alleged custom or practice to ring the bell and sound the whistle for certain nearby street and road crossings, and that Gesswine relied upon the undeviating habit of the company in that matter to give him warning of the approach of trains while working upon the main track, and that these crossing signals were not given upon the morning of his injury. As to whether the whistle was sounded upon approaching the crossings referred to was a matter about which there was a conflict of evidence, and for the purpose of the present review we must assume that such crossing signals were omitted upon this occasion. Another ground upon which the right of action is rested is that the train which collided with deceased habitually traveled through the limits of the city at a speed not exceeding 10 to 15 miles per hour, and that this fact was known to and relied upon by Gesswine, but that on this occasion the train was moving at an extraordinary speed of from 45 to 50 miles per hour, and thus came upon him with an unexpected rapidity which allowed no reasonable time to get out of the way, considering the difficulty of seeing its approach by reason of the fog or of hearing it by reason of the noise of a nearby switching engine.

First, as to the omitted crossing signals: Gesswine was not a traveler using or about to use a crossing. He was not even at work upon the track at a crossing, though there were crossings on either side of him; the crossing nearest on the side from which this train approached being within about 100 feet. The evidence of a "custom" to ring or whistle for that and other crossings within hearing was objected to, upon the ground that crossing signals are intended for those who are crossing, those who are about to cross, and those who have just crossed a public highway, and are not required or given for the benefit of employees engaged in work upon the track. This specific objection was overruled, and the evidence admitted without restriction or limitation.

Sections 3336 and 3337, Rev. St. Ohio 1892, provide for the giving of signals for railroad crossings, and the so-called "custom" was a compliance with this statute. Such statutes are obviously for the benefit of those using or about to use the crossing, and do not impose any duty in respect to any other class of persons. This is the construction placed on the Ohio statute in *Railway Co. v. Workman*, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602. A like construction has been given such statutes in other jurisdictions. *Reynolds v. Grt. N. R.*, 69 Fed. 808, 813, 16 C. C. A. 435, 29 L. R. A. 695; *Harty v. Cent. Rd. Co.*, 42 N. Y. 468; *Railroad v. Feathers*, 10 Lea (Tenn.) 105; *Hale v. Railroad*, 34 S. C. 292, 13 S. E. 537; *Railway Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550. In *Schimberg v. Cutler* (decided by this court during this term) 142 Fed. 701, we held the

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liability imposed by statute for failing to erect guard rails at dangerous places along a public road was imposed only for the benefit of those using the road as such. The neglect to comply with the statute was not therefore negligence of which the deceased could complain.

The principle is the same whether the "custom" of ringing and whistling for road or street crossing be imposed by rule of the company or by operation of the common law in respect of the care proper to be exercised at points where the railway and the public have equal rights, as at a public crossing. The duty would be one imposed for the benefit of those using or about to use the crossing. That such road crossing signals were not given upon this occasion may be relevant, provided it otherwise appears that the circumstances were such as to make it the duty of the company to give to trackmen some audible notice of the approach of its trains. A warning whistle, upon approaching a street crossing within 100 feet of where Gesswine and his fellows were at work, would in fact be a warning to him, although primarily intended to warn those using the crossing. Failure to discharge some duty owed by the company to employees engaged in track repairing, under the circumstances of this case, is indispensable to a recovery by this plaintiff, and evidence to establish a custom to give signals for another purpose, and for the benefit of the general public using a crossing, was not competent or relevant to make out the breach of an actionable duty to Gesswine.

The court erred, for the reasons already given, in permitting the witness Frank Gesswine to testify that he, and the others of the gang of which the witness and deceased were members, relied upon the custom of the company to ring and whistle for such crossings to warn them when repairing track in the vicinity of the approach of trains.

The same principle is applicable to the municipal ordinance of Ironton in respect to the speed of trains within the corporate limits. Such ordinances are for the benefit of the public. Section men, whose duty required them to work upon the track, cannot predicate negligence upon disobedience of such a law. Such laborers when engaged in the discharge of their duties are not within the protection of such ordinances.

Columbus Webb was one of plaintiff's witnesses to prove the excessive speed of the train which collided with Gesswine. This occurred:

"Q. Did you see the train go by that morning that killed those men? A. Yes, sir; I seen it that morning, if I was there, or wherever I was, I seen that train that morning and talked about that train. Q. What did you talk about? A. I talked about the train. Q. Well, what was said?"

Counsel for the defendant here objected to this question, "because it is hearsay and the detailing of a conversation." The objection was overruled, and the witness answered by saying: "Talked about it running fast." This was error. The answer

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was prejudicial, as tending to show that the speed of the train was so unusual and extraordinary as to be the occasion of conversation and comment. What was said was not *res gestæ* for it is not shown to have been contemporaneous with the passing of the train. It may have occurred at any time that morning and at any place in the town. What the witness said to others or they to him was hearsay, and the evidence should have been excluded.

No error has been assigned upon the charge of the court other than upon its refusal to instruct the jury to find for the railway company. The case is to be reversed for the errors already indicated. The question arising upon the denial of the motion for a peremptory instruction is not free from doubt, and a different face may be put upon the case upon another trial. We therefore forbear to express any opinion upon the facts of the case, or upon other questions presented by the charge, but not assigned as error.

Reverse and remand for a new trial.

POWERS v. PERE MARQUETTE R. CO.

(Supreme Court of Michigan, March 19, 1906.)

[106 N. W. Rep. 1117.]

Negligence—Evidence—Sufficiency to Go to Jury.—Where, under the testimony, the cause of an accident resulting in a personal injury is conjectural merely, the case should not go to the jury.

Same—Burden of Proof—Death without Witnesses.*—Where an accident resulting in the death of plaintiff's intestate, occurred in the absence of witnesses, plaintiff, suing for the death, is not relieved from the burden of proving the negligence of defendant, and that the death was caused by his negligence, merely because it is presumed that decedent exercised due care.

Same—Submission of Issues to Jury—Evidence—Sufficiency.—Where a court can see testimony from which a probability can legitimately arise in favor of plaintiff, suing for death negligently inflicted, the cause should be submitted to the jury.

Same—Evidence—Sufficiency to Require Submission to Jury.—Evidence in an action against a railway company for the death of a switchman examined, and held insufficient to submit the case to the jury.

*For the authorities in this series on the subject of the effect of the presumption of the exercise of due care by a person killed by a train or car, see *Looney v. Metropolitan R. Co.*, etc. (U. S.), 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617; *Riska v. Union Depot R. Co.* (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294; foot-note appended to *Stewart v. North Carolina R. Co.* (N. Car.), 16 R. R. R. 212, 39 Am. & Eng. R. Cas., N. S., 212; *Highland Ave. & B. R. Co. v. Swope* (Ala.), 13 Am. & Eng. R. Cas., N. S., 856; *Augusta Southern R. Co. v. McDade* (Ga.), 12 Am. & Eng. R. Cas., N. S., 548; *Gammage v. Atlanta*, etc., R. Co. (Ga.), 5 Am. & Eng. R. Cas., N. S., 709; *Sims v. Western & A. R. Co.* (Ga.), 17 Am. & Eng. R. Cas., N. S., 756; *Strom v. Georgia R. & B. Co.* (Ga.), 12 Am. & Eng. R. Cas., N. S., 848; *St. Louis & S. F. Ry. Co. v. Townsend* (Ark.), 22 Am. & Eng. R. Cas., N. S., 123.

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Error to Circuit Court, Kent County; Willis B. Perkins, Judge.

Action by Mary A. Powers, administratrix of Nicholas J. Powers, deceased, against the Pere Marquette Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before BLAIR, MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ.

Emanuel J. Doyle (*Francis A. Stace*, of counsel), for appellant.

Frederick W. Stevens (*Charles McPherson*, of counsel), for appellee.

HOOKER, J. The plaintiff's intestate was killed upon the defendant's railroad, and this action was brought to recover damages upon the ground of defendant's negligence. The deceased was an employee of defendant—i. e., a switchman—and just previous to his death was riding upon the footboard in front of defendant's switch engine. No one witnessed his fall from the engine. He was noticed when under the wheels of the engine or car, and the train was stopped. The negligence alleged is that the footboard was checked in the ends, and was supported by brackets that were too short for the purpose, extending only to within four inches from the outer edge of the footboard. The evidence showed checks in each end of the plank, and that the plank extended four inches beyond the ends of the brackets. The footboard was of oak, two inches thick. Nothing indicates that it was unsound. It was about seven inches from the top of the rails. After the accident it was found freshly split the entire length of the board, but the splits from the two ends did not meet. They were connected by slivers—one large sliver about midway between the two ends which was of the full thickness of the plank. The others were smaller, and there were more of them towards the lower or under side of the plank than above. The portion outside of the brackets was bent upward, and it was found, upon moving it, that it would remain in any position that it was left; e. g., pointing downward, or horizontally. All of the testimony tended to show that the deceased must have fallen across the track, his head outside and the feet between the rails, and that he was dragged 24 feet or more from where he was struck by the footboard. There was proof that three or four men had been upon this board at one time shortly before the accident. It was plaintiff's theory that the splitting of the board caused her intestate to fall upon the track in front of the engine, while defendant's counsel say that the condition and position of the split portion, and the evidences of dragging, etc., indicate that it was split off and turned upward by reason of the rolling under it of the deceased, who was a man of about 170 pounds weight. It is urged that this is the more probable theory of the two, but that, if not the cause of the fall, the true cause is matter of conjecture merely. A verdict was directed for the defendant, and plaintiff has appealed.

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The questions before us are two: (1) Should the court have allowed the jury to find the accident to have been caused by defendant's negligence? (2) If that would otherwise have been proper did not the deceased's assumption of the risk of riding upon the footboard in its apparent condition forbid such submission? This court has held many times that a case should not go to a jury where, under the testimony, the cause of the accident is conjectural merely. Counsel for the plaintiff admit in their brief that this is the rule: "That when the damages arose from one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damages were produced by the former cause; and he must fail, also, if it is just as probable that they were caused by one as the other." But they contend that the circumstances show a probability in favor of plaintiff's theory, and that the circuit judge was of the opinion that the cause could not be disposed of as conjecture merely. The learned circuit judge did not direct a verdict upon this ground, but upon the theory of deceased's assumption of the risk. Perhaps it is inferable that counsel are right about his views. In his disposition of the case he said: "The question is whether the weather checks, as shown by the evidence, were sufficiently dangerous to authorize the submission of the question to the jury to determine whether or not this footboard would have split by the weight of the deceased when placed upon the outer edges thereof. The burden of proof in a negligence case rests upon the plaintiff to establish two propositions: First, the negligence of the defendant; and, secondly, freedom from contributory negligence on his own part, or on the intestate's part. The plaintiff's case, therefore, must rest upon this narrow proposition: that the checked footboard is evidence of the defendant's negligence, and that, no one having seen the deceased at the time he fell, the presumption must follow that he was in the exercise of due care and caution, and did not by any act of negligence on his part contribute to his own death. There is some language used in the Mynning Case which would indicate that the plaintiff is required to show by some evidence that her intestate was in the exercise of due care in order to justify a recovery. I cannot reconcile this language with the other proposition that, in the absence of all proof to the contrary, the legal presumption arises that a person who is killed in an accident is in the exercise of due care and caution. as held in the Mynning Case in 64 Mich., at page 64, 31 N. W. 147, 8 Am. St. Rep. 804, to which I have referred, and the other cases cited by plaintiff's counsel. If there was no defect, as shown by the evidence, in the footboard, there could not in any event be a recovery; but, if the presumption is to be applied that the deceased was free from contributory negligence, as indicated by the cases referred to, and as I believe the rule to be, then the question is, is the defect shown of sufficient importance to

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authorize a jury to speculate upon the probabilities of the cause of deceased's death? Without further analysis, gentlemen, I am convinced, first, that the defect complained of in this footboard amounts to some evidence of negligence on the part of the defendant company. While the footboard had been used almost continuously for some time, down to the time of the accident, by the deceased and others, it seems to me that under the circumstances shown there is some evidence of negligence to go to the jury." From this we judge that he extended the rule that contributory negligence of one killed will not be presumed, when no evidence tends to show it, by substantially intimating that this presumption is sufficient to take the question of the cause of an accident out of the realm of conjecture. In other words, where death raises the presumptions of care on the part of the deceased, a corresponding presumption arises in support of the theory of the plaintiff, and, where any coincident negligence of the defendant is shown, it takes the case to the jury upon the assumption that, where deceased is presumed to have been free from negligence, it must follow that defendant's negligence caused the accident.

This view takes no account of the fact that a man may suffer an injury without being negligent himself, and where a defendant is not negligent, or where, being negligent, such negligence was in no way the cause of the accident. Grant that in this case a presumption takes the place of proof of due care on the part of the deceased, does it relieve the plaintiff also from the burden of proving, as in other cases, (1) the negligence of defendant, and (2) that the injury was caused by such negligence? Upon such a theory the burden of proof, as to both of these facts, is shifted in all cases where the accident is without witnesses, except the injured party, who met death in the accident, and it would follow that many of the cases are wrongly decided; and it would seem that there is no excuse for the enunciation of the doctrine that a case should not go to the jury, where a verdict must rest upon a conjecture or guess, a rule which has been iterated and reiterated by many if not most courts, including our own. See *Mynning v. D. L. & N. R. Co.*, 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804; *Quincy Mine v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Brown v. Street Ry. Co.*, 49 Mich. 153, 13 N. W. 494; *Mitchell v. G. T. Ry.*, 51 Mich. 237, 16 N. W. 388, 47 Am. Rep. 566; *Stern v. M. C. R. Co.*, 76 Mich. 591, 43 N. W. 587; *Toomey v. Steel Works*, 89 Mich. 249, 50 N. W. 850; *Robinson v. Wright & Co.*, 94 Mich. 286, 53 N. W. 938; *Manning v. Railway*, 105 Mich. 263, 63 N. W. 312; *Perry v. Railway*, 108 Mich. 130, 65 N. W. 608; *Knapp v. C., etc., Ry.*, 114 Mich. 201, 72 N. W. 200. See Elliott on Railroads, § 1299. There is another line of cases which hold that, where a court can see testimony from which a probability can legitimately arise in favor of a plaintiff, the cause should not be taken from the jury, and whether there is such is the controlling factor upon this point.

What is there to indicate a probability that plaintiff fell from

Franklin v. Atlanta, etc., Ry. Co

the splitting of the board? We have examined the proof and plaintiff's brief in vain to find a circumstance which throws any light upon the question, and are forced to say that it is as probable that he inadvertently tripped or stepped over the edge, slipped, or fell, as that his weight caused the plank to split off, thereby precipitating him upon the rails.

The judgment is affirmed.

FRANKLIN *et al.* v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of South Carolina, May 8, 1906.)

[54 S. E. Rep. 578.]

Carriers—Indignities to Passengers—Liability of Lessor Railroad.*

—A domestic railroad company is liable for indignities received by a passenger from a fellow passenger on the cars of such road operated by a lessee.

Evidence—Documentary.—Where defendant proposed to introduce a record of a hospital purporting to contain a statement made by the plaintiff when entering that institution for treatment, and the record showed an interrogation point placed after the word "cured," and that certain words had been inserted near the end of the record, which changes were not made by any physician of the hospital, and no evidence to account for them was introduced, the record was properly excluded.

Witnesses—Memoranda—Refreshing Memory.—Where a witness testified to making a record at the time of the transaction, and that he would not have made it if it had not been true, it is a sufficient basis for him to testify from as to the facts as they appear in his record, though he may not be able to recall these facts to his memory.

Trial—Instructions.—Where the court has stated the issues raised by the pleadings, it is not error to say to the jury that they can take the pleadings with them, examine them, and see what issues are raised.

Carriers—Protection of Passengers.†—A carrier is bound to protect a passenger from indignities as against a fellow passenger only where it has reason or notice to anticipate improper conduct.

H. Pope, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Greenville County; Klugh, Judge.

Action by Suda L. Franklin and Howard H. Franklin against the Atlanta & Charlotte Air Line Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

*For the authorities in this series of the subject of the liability of a lessor railroad for injuries sustained while its road is operated by the lessee, see foot-notes appended to *Chicago, etc., R. Co. v. Schmitz* (Ill.), 18 R. R. R. 214, 41 Am. & Eng. R. Cas., N. S., 214; foot-notes appended to *Chicago & W. I. R. Co. v. Newelle* (Ill.), 15 R. R. R. 706, 38 Am. & Eng. R. Cas., N. S., 706; foot-notes appended to *Chicago Term. Transfer Co. v. Vandenberg* (Ind.), 17 R. R. R. 740, 40 Am. & Eng. R. Cas., N. S., 740.

†See foot-note appended to *Nashville, etc., Ry. Co. v. Flake* (Tenn.), 16 R. R. R. 552, 39 Am. & Eng. R. Cas., N. S., 552.

Franklin v. Atlanta, etc., Ry. Co

W. A. Henderson and T. P. Cothran, for appellant.

Johnstone & Welch and Haynesworth & Patterson, for respondents.

WOODS, J. Plaintiff recovered a judgment of \$25,000 damages against defendant, arising out of its alleged failure to protect her while a passenger on its railroad, between Greenville and Atlanta, from the indignity which she averred she suffered from a fellow passenger, in putting his arms around her and taking other liberties with her person, against her will, and using indecent language in her presence. While the exceptions are numerous, the appeal really involves only five questions.

1. The defendant having admitted ownership of the railroad under a charter obtained from the state, it could not escape liability on the ground that the tort, if any, was committed by another corporation actually operating the road, and evidence on that point was properly excluded as irrelevant. This question has been recently settled after full argument in *Smalley v. A. & C. A. L. Ry. Co.* (S. C.) 53 S. E. 1000, overruling *Pennington v. Railway Co.*, 35 S. C. 439, 18 S. E. 452.

2. As an important element of her damages, the plaintiff offered testimony to prove that the alleged indignities, and a fall received in the car while moving her seat to escape the annoying advances, had brought on an illness which resulted in a miscarriage and great suffering. In rebuttal the defendant proposed to introduce a record of the Grady Hospital, purporting to contain a statement made by the plaintiff, when entering that institution for treatment, about four years before this illness, and the history of her case while there. The record was produced by Dr. Johns, who testified it was made by him as one of the hospital physicians. As we understand, the defendant contends this record would have tended to prove that, according to her own statement then made, the plaintiff's physical condition was such as to make a miscarriage probable without any such shock and excitement as are here alleged. According to the evidence of Dr. Johns the record as made by him contains these words: "Discharged cured April 27, '99." When produced in court the record showed an interrogation point had been placed after the word "cured" and the words "(3-32 We uranalysis sp. gr. 1019 acid neg. M.)" had been inserted near the end of the record. These changes, it appears, were not made by Dr. Johns or any other physician of the hospital, and the defendant offered no evidence to account for them. To have effect as independent proof of the facts stated in it, a paper must speak in its integrity of all that it contains. As there were alterations appearing after the record was made, before the defendant could have the benefit of the record as proof in itself of its contents, it was incumbent upon it to satisfactorily explain these alterations. This the defendant was unable to do, and the circuit court did not err in excluding the paper as record evidence. *Kennedy v. Moore*, 17 S. C. 466.

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3. But the circuit justice held, further, that Dr. Johns could not as a witness speak from this record made by him as to the statements of plaintiff there written down concerning her physical condition and as to the hospital history of her case, unless after refreshing his memory, he could testify to those things as facts within his memory independent of the record. When a witness testifies to making a record at the time of the transaction, and that he would not have made it if it had not been true, this is a sufficient basis for him to testify as to the facts as they appear in his record, though he may not be able to recall these facts to his memory. The rule is thus stated in *Bank v. Zorn*, 14 S. C. 444, 450, 37 Am. Rep. 733: "The rule upon this subject, in its broadest outline, embraces two classes of cases: First, where the witness, after referring to the paper, speaks from his own memory, and depends upon his own recollection as to the facts testified to; where he relies upon the paper and testifies only because he finds the facts contained therein. In the first class, the paper is always permitted to be used by the witness without regard to when or by whom made. In the second class, this rule of admission is much more stringent. In fact, it cannot be used unless it be an original paper made by the witness himself, and contemporaneously with the transaction referred to." *State v. Rawls*, 2 Nott & McC. 331; *Greenleaf on Evidence*, 439b. As we understand the counsel for respondent did not dispute this general rule of evidence, but insisted that in the application of the rule Dr. Johns did not sufficiently establish the verity of his record to warrant the use of it by him in this testimony, and they further contend the evidence was irrelevant and immaterial. We cannot agree to the view that Dr. Johns did not swear with sufficient clearness to the verity of the record as made by him, for he distinctly testified more than once that, while he could not recall to his memory the statement imputed to Mrs. Franklin in his record, yet he knew he made it so far as it was in his handwriting, and that he would not have written down the statement if it had not been made by the plaintiff at the time. As the case is to go back for a new trial, it will be safer to say, without discussion, that we think this evidence relevant, and it was material because not in agreement with some of the evidence of plaintiff on the same point, as will appear by reference to parallel columns incorporated in the opinion of the Chief Justice. For instance, Mrs. Franklin denied saying she had taken bromides and opiates to prevent miscarriage; that statement being attributed to her by Dr. Johns. All evidence tending to show that miscarriage was not improbable, without the fall and indignities which plaintiff testified she suffered on the train, was important to the defendant. Especially was this so in view of the fact that the conductor, and the other employees of the defendant on the train, testified there was no fall and no indignities from a fellow passenger, of which they had any notice, and that they saw nothing which would require or justify the conductor's interference in the plaintiff's behalf, until he did inquire her wishes and conform

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to them by taking her to another seat, at the same time warning the man who had annoyed her not to approach her again. We think it was therefore competent for Dr. Johns to testify from his record as to the statements made by Mrs. Franklin to him or in his presence and to his own diagnosis. It need hardly be said it was not competent for him to testify from his record as to the diagnosis of any other physician, because that would be mere hearsay.

4. The circuit judge stated explicitly to the jury the issues of both law and fact made by the pleadings, and we do not see that there was any objections to his suggesting to the jury to read over the pleadings in their room in order to obtain a clear perception of the issues of fact.

5. The defendant next insists the circuit judge erred in charging the jury: "A common carrier is bound to exercise as high a degree of care to protect a passenger from the wrong or injury of a fellow passenger as it is to observe, in order to protect all of the passengers from injury arising from the faulty construction of the railroad track, or the faulty running of the railroad trains." This instruction is well supported by authority. *Thompson on Carriers of Passengers*, 304; *Simmons v. New Bedford, etc., Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Pittsburg R. R. Co. v. Pillow*, 76 Pa. 511, 18 Am. Rep. 424; *Richmond R. R. Co. v. Jefferson (Ga.)* 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. Rep. 87 and note; *Spohn v. Railroad Co.*, 87 Mo. 74; *Louisville & Nashville R. R. Co. v. McKenna*, 2 Am. & Eng. R. Cas. 114; *Spangler v. St. Joseph & G. I. Ry. Co. (Kan.)* 74 Pac. 607, 63 L. R. A. 634.

But there are factors which enter into the practical application of the rule of the highest degree of care to the protection of passengers from improper conduct of fellow passengers which are not present in its application to the carrier's mechanical agencies and its servants. Due regard to known mechanical laws, and the selection of employees, are matters within the control of the carrier; but a carrier has only a limited control over passengers on its trains. It has no right to direct their actions, so long as they do not conflict with its rules reasonably necessary for the conduct of its business, or with the correlative rights of the other passengers. Indeed, interference on the part of a conductor with free communication between passengers will be generally regarded as impertinent by those concerned, except when there is a clear violation of the rules of good behavior by one passenger to the annoyance of others. When that moment comes, it is obviously the duty of the conductor to act, but to know the moment, until complaint is made by the passenger of annoyance, is often extremely difficult. Ordinarily, any unwelcome advances by one passenger to another may be effectively rebuffed by the passenger himself. In applying the highest degree of care to this duty of protection by the conductor, it is further to be borne in mind that good conduct and respect among passengers is the rule, and insult and wrong extremely rare, and

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that experience has shown that the other duties of a conductor requiring his absence from the car from time to time may ordinarily be performed without risk of injury of one passenger to another in his absence. Hence it cannot be laid down as a general proposition that the exercise of the highest degree of care for the protection of passengers from each other requires that the carrier should keep a watch over the passengers on its train, except over those from whom it has reason to anticipate improper behavior. The rule thus stated, in 1 Fetter on Carriers of Passengers, is in accord with practically all the authorities: "Carriers of passengers are not insurers of the entire immunity of their passengers from the misconduct of fellow passengers or of strangers, any more than they are insurers of the absolute safety of passengers in other respects. Nor can the carrier be held liable for such misconduct on the principle of respondeat superior, as in the case of the misconduct of his servants. But, although the doctrine is of comparatively recent growth, it is now firmly established that a carrier of passengers must exercise the same high degree of care to protect them from the wrongful acts of their fellow passengers or of strangers that is required for the prevention of casualties in the management and operation of its train, namely, the utmost care, vigilance, and precaution consistent with the mode of conveyance, and with its practical operation. While not required to furnish a police force sufficient to overcome all force when unexpectedly and suddenly offered, it is the carrier's duty to provide help sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties, and, having furnished such force, the carrier is chargeable with their neglect in failing to protect a passenger from assaults by strangers. This strict rule of duty must, however, be applied in view of the relation which the carrier sustains to all the passengers, and the circumstances of each particular case calling for its exercise. Knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it." Here the evidence on the side of the plaintiff was that the conductor told her that the conduct of the passenger, who the plaintiff claimed maltreated her, had been improper towards other females on the same train, but this was positively denied by the conductor, who testified he had no reason whatever to expect misconduct from him. With this vital issue of fact before the jury, the circuit judge, in charging the general proposition that a railroad company is bound to keep a watch over passengers on its train, stated too strong a test of the degree of diligence required. True, the court said in the same connection: "But you see the distinction that exists necessarily between the construction of the road or the running of a train of cars, and the care it must exercise to see that one is not injured by a fellow passenger. It is bound

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to exercise as high a degree of care as is consistent with the circumstances in each case; but there is a distinction between the two cases, protecting a passenger from the wrong or injury of a fellow passenger, and protecting a passenger from injury of a defective road or operating the dead matter which constitutes the railroad track and train. Now, the obligation is upon the railroad company to exercise care in both cases, and as high degree of care as is consistent with the circumstances surrounding each of the respective sources of danger; that is, the human being on the one hand and the railroad track and train on the other hand. And that is the distinction between the degrees of care or responsibility to which the law holds the railroad company, when it is apprised of the possibility or probability of a fellow passenger to wrong or injure a passenger, and it is bound to exercise as high a degree of care to protect a passenger from the wrong or injury of a fellow passenger as it is to observe, in order to protect all of the passengers from injury arising from the faulty construction of the railroad track or the faulty running of the railroad train." But we think the jury could not have failed to receive the impression that the law required of the carrier the keeping of a constant watch over its passengers, not only after having information which should lead it to anticipate misconduct and guard against it, but to maintain such watch even when it had no reason to expect anything but the good conduct and courtesy usual among passengers on its train, in order to obtain information as to the conduct of the passengers.

For the errors which we have pointed out, the judgment is reversed, and the cause remanded for a new trial.

JONES, J., concurs.

GARY, A. J., concurs, except in so far as the exceptions raising the question numbered 3 in the opinion are sustained.

BIRMINGHAM RY., LIGHT & POWER CO. *v.* JONES.

(Supreme Court of Alabama, April 28, 1906.)

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Same—Duty to Request Instructions.—Where the complaint in an action against a street railway company for the death of a child struck by a car charged that the company was guilty of simple negligence, and of wantonness and an intentional killing, and the court charged that plaintiff's case was made out on the jury being satisfied that either the first or second count of the complaint was true, it was the duty of the company to request a charge explanatory of the effect of contributory negligence on the count charging simple negligence, if it deemed that important.

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to exercise as high a degree of care as is consistent with the circumstances in each case; but there is a distinction between the two cases, protecting a passenger from the wrong or injury of a fellow passenger, and protecting a passenger from injury of a defective road or operating the dead matter which constitutes the railroad track and train. Now, the obligation is upon the railroad company to exercise care in both cases, and as high degree of care as is consistent with the circumstances surrounding each of the respective sources of danger; that is, the human being on the one hand and the railroad track and train on the other hand. And that is the distinction between the degrees of care or responsibility to which the law holds the railroad company, when it is apprised of the possibility or probability of a fellow passenger to wrong or injure a passenger, and it is bound to exercise as high a degree of care to protect a passenger from the wrong or injury of a fellow passenger as it is to observe, in order to protect all of the passengers from injury arising from the faulty construction of the railroad track or the faulty running of the railroad train." But we think the jury could not have failed to receive the impression that the law required of the carrier the keeping of a constant watch over its passengers, not only after having information which should lead it to anticipate misconduct and guard against it, but to maintain such watch even when it had no reason to expect anything but the good conduct and courtesy usual among passengers on its train, in order to obtain information as to the conduct of the passengers.

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Negligence—Contributory Negligence—Infants.‡—A child between 7 and 14 years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity.

Street Railroads—Injury to Pedestrian on Track—Instructions.—An instruction in an action against a street railroad company for the death of a child struck by a car, which, after hypothesizing the failure of the motorman to do all that a reasonably prudent motorman would have done under the circumstances to save the life of the child, fails to further hypothesize that the failure proximately caused the injury, is erroneous.

Trial—Errors in Instructions—Cured by Other Instructions.—An error in an instruction in an action against a street railway company for the death of a child struck by a car, arising from the failure to hypothesize that the failure of the motorman to do what a reasonably prudent person would have done under the circumstances to save the life of the child proximately caused the injury, is cured by an instruction that if the motorman failed, after he became aware of the peril of the child, to do all in his power with the means at hand to save the child, and that the death was the proximate cause of such failure, the motorman was guilty of wantonness, authorizing a verdict for plaintiff, though the child was guilty of contributory negligence.

Same—Duty to Request Instructions.—Where the complaint in an action against a street railway company for the death of a child struck by a car charged that the company was guilty of simple negligence, and of wantonness and an intentional killing, and the court charged that plaintiff's case was made out on the jury being satisfied that either the first or second count of the complaint was true, it was the duty of the company to request a charge explanatory of the effect of contributory negligence on the count charging simple negligence, if it deemed that important.

Negligence—Contributory Negligence—Infants.§—Mere capacity on

†See foot-notes appended to *Lake Shore & M. S. Ry. Co. v. Barnes* (Ind.), 19 R. R. R. 145, 42 Am. & Eng. R. Cas., N. S., 145; foot-notes appended to *Southern Ry. Co. v. Yancy* (Ala.), 13 R. R. R. 467, 36 Am. & Eng. R. Cas., N. S., 467.

‡For the authorities in this series on the question whether young children can be chargeable with contributory negligence, see foot-notes appended to *Goldstein v. People's Ry. Co.* (Del. Super. Ct.), 19 R. R. R. 529, 42 Am. & Eng. R. Cas., N. S., 529; foot-notes appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154; *Birmingham Ry., etc., Co. v. Hinton* (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173.

§For the authorities in this series on the subject of the care required of children for their own safety, see foot-notes appended to *Goldstein v. People's Ry. Co.* (Del. Supr. Ct.), 19 R. R. R. 529, 42 Am. & Eng. R. Cas., N. S., 529; foot-notes appended to *Murphy v. Boston Elev. Ry. Co.* (Mass.), 17 R. R. R. 838, 40 Am. & Eng. R. Cas., N. S., 838; foot-notes appended to *Christensen v. Oregon Short Line R. Co.* (Utah), 16 R. R. R. 121, 39 Am. & Eng. R. Cas., N. S., 121.

Birmingham Ry., L. & P. Co. v. Jones

Charge 9: "Mere capacity to know danger, though it is this in a boy under 14 years old, is not necessarily sufficient to make him guilty of contributory negligence in doing a thing which would be negligence in one of mature age."

The defendant requested the following charges, which were refused: Charge 3: "If from all this evidence you believe that the motorman did everything that could have been done to prevent the car from running over the boy, you must render your verdict in favor of the defendant." Charge 5: "If you believe from the evidence that the motorman saw the boy running in a diagonal direction towards the track, that when he saw the boy running towards the track the motorman sounded his gong repeatedly to warn the boy of the approach of the car, that when the boy was 8 or 10 feet from the track and the car was 8 or 10 feet from the boy he looked towards the car and immediately increased his efforts to get across the track in front of the car, that as soon as the motorman saw the boy running towards the track he put the brake on the car and reduced the speed of the car from 7 or 8 miles an hour to 4 or 5 miles an hour, that when the boy looked towards the car the speed of the car had been reduced to 4 or 5 miles an hour, and as soon as the motorman saw that the boy was going upon the track in front of the car the motorman reversed the car and did all he could to stop the car and prevent striking the boy, you must find your verdict for the defendant."

There was verdict and judgment for plaintiff for \$5,000.

Tillman, Grub, Bradley & Morrow, for appellant.

Bowman, Harsh & Beddow, for appellee.

HARALSON, J. The first count was sufficient to charge simple negligence, the negligence complained of relating to the management or control of the car. *L. & N. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 South. 700; *C. of G. R. R. Co. v. Freeman*, 134 Ala. 354, 32 South. 778; *M. & O. R. R. Co. v. George*, 94 Ala. 216, 10 South. 145.

The second count properly charged wantonness or an intentional wrong. *Russell v. Huntsville R. R.*, 137 Ala. 627, 34 South. 855; *C. of G. R. R. v. Foshee*, 125 Ala. 226, 27 South. 1006.

Contributory Negligence is no defense to a count charging wantonness and the intentional killing of deceased, and the demurrers to said pleas setting up that defense, as to the second count, were properly sustained. *L. & N. R. R. Co. v. York*, 128 Ala. 305, 30 South. 676; *Highland Avenue & Belt R. R. v. Robbins*, 124 Ala. 118, 27 South. 422, 82 Am. St. Rep. 153; *L. & N. R. R. Co. v. Markee*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21.

Charge 1 for plaintiff stated an undisputed fact, and while the trial court would not be reversed for refusing it, it was not reversible error to give it.

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A child between 7 and 14 years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity. There was no error in giving charge 2. Pratt Coal Co. v. Brawley, 83 Ala. 371, 3 South. 555, 3 Am. St. Rep. 751; Government St. R. R. Co. v. Hanlon, 53 Ala. 70.

Charge 3, for the plaintiff, if not faulty in other respects, after hypothesizing the failure of the motorman to do all that a reasonably prudent and cautious motorman could and would have done under the circumstances to save the life of plaintiff's intestate, fails to further hypothesize, that such failure itself proximately caused the injury, without such averment the charge was faulty, and its giving was error. L. & N. R. R. Co. v. Anchors, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116.

Charge 4 requested by the plaintiff contains the averments lacking in the third charge, and this redeems it from error.

Charge 5 stated a truism. The plaintiff made out her case if either count was proved. The defendant could have requested a charge explanatory of the effect of contributory negligence upon the 1st count, if it deemed that important.

We have not been shown that there was reversible error in giving charge 9, requested by the plaintiff.

Charge 3, requested to the defendant, was misleading if not otherwise faulty. It ignores the duty of the motorman to keep a lookout for persons or obstructions on the track.

The fifth charge refused to the defendant was argumentative and gave undue prominence to one phase of the evidence. Ross v. State, 139 Ala. 144, 36 South. 718. Besides, the charge given for defendant on top of page 10 of the transcript, which we have marked A, was in effect substantially the same as this refused charge and equally as favorable to the defendant.

The judgment of the city court is reversed and the cause remanded.

Reversed and remanded.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

GULF, C. & S. F. RY. CO. v. MATTHEWS *et al.*

(Supreme Court of Texas, June 6, 1906.)

[93 S. W. Rep. 1068.]

Railroads—Personal Injuries—Persons Walking on Track—Voluntary Exposure to Danger.*—Though an implied permission to use a railroad track as a footpath may relieve a person so using it from the imputation of being a trespasser, nevertheless, if he walks on the

*For the authorities in this series on the question whether it is contributory negligence to use ordinary railroad tracks as a foot-path at points other than highway crossings, see Gregory v. Louisville & N. R. Co. (Ky.), 12 R. R. R. 293, 35 Am. & Eng. R. Cas., N. S., 293 (walking on track instead of in highway or between tracks); Carter v. Southern Ry. Co. (N. Car.), 11 R. R. R. 324, 34 Am. & Eng. R. Cas.,

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track when he could, with equal convenience, walk by the side of it and out of danger, he is guilty of contributory negligence as a matter of law.

Witnesses—Contradiction and Impeachment—Admissibility of Evidence.—In an action against a railroad company for negligently causing the death of a person walking on its tracks, a witness for plaintiff testified that deceased, or a person of the same name and answering his description, had registered at the hotel where witness was clerk the night before the accident, and had left there the following morning, going in the direction of the place where deceased was killed. On cross-examination the witness testified that he had told but one person of these facts prior to being examined as a witness. Held that, to affect his credibility, it was competent to ask him on cross examination if he had not read newspaper reports and heard rumors to the effect that deceased had been killed and that it was suspected that he had been foully dealt with, and also to introduce evidence that the person whom the witness claimed to have told about his knowledge of the whereabouts of deceased was, at the time the witness made the statements, reported to be dead.

Appeal—Harmless Error—Exclusion of Evidence.—The exclusion of this evidence was not rendered harmless by the admission of testimony by the person whom the witness claimed to have told that he had never heard of the killing of deceased.

Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Maggie Matthews and others against the Gulf, Colorado & Santa Fe Railway Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals (89 S. W. 983), and defendant brings error. Reversed and remanded.

See 66 S. W. 588; 73 S. W. 413.

J. W. Terry, Chas. K. Lee, and Smith & Wall, for plaintiff in error.

Wolfe, Hare & Marey, for defendants in error.

WILLIAMS, J. Some of the questions involved in this case were certified to this court by the Court of Civil Appeals and the answers given may be found in 88 S. W. 192. Those answers hold, in substance, that the facts stated in the certificate justified the trial court in submitting to the jury the questions whether or not the evidence established an implied permission

N. S., 324; *Clegg v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 737, 34 Am. & Eng. R. Cas., N. S., 737; *Atchison, etc., Ry. Co. v. Schwindt* (Kan.), 8 R. R. R. 470, 31 Am. & Eng. R. Cas., N. S., 470 (walking on track in street without necessity); *Macks v. Atlantic Coast Line R. Co.* (N. Car.), 8 R. R. R. 756, 31 Am. & Eng. R. Cas., N. S., 756 (epileptic walking on track); *Law v. Missouri, K. & T. Ry. Co.* (Tex.), 2 R. R. R. 582, 25 Am. & Eng. R. Cas., N. S., 582 (licensee walking on track, question for jury); *Loughrey v. Pennsylvania R. Co.* (Pa.), 2 R. R. R. 567, 25 Am. & Eng. R. Cas., N. S., 576 (walking on track in street without necessity); *Denver & R. G. R. Co. v. Buffehr* (Colo.), 4 R. R. R. 762, 27 Am. & Eng. R. Cas., N. S., 762; *Weeks v. Wilmington & W. R. Co.* (N. Car.), 5 R. R. R. 28, 28 Am. & Eng. R. Cas., N. S., 28; *Morgan v. Wabash R. Co.* (Mo.), 20 Am. & Eng. R. Cas., N. S., 372 (trespasser walking on track); foot-notes appended to *Hamlin v. Columbia, etc., R. Co.* (Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1 (deaf persons).

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from the defendant for the use of its track by pedestrians, and whether or not deceased was guilty of contributory negligence in walking on the track. The conclusion that there was evidence authorizing the submission of these questions ends all inquiry into them which this court is empowered to make.

It is contended that the evidence in the record now before us shows conclusively that deceased, when struck by the engine, was lying upon the track, and not walking upon it, as was stated in the certificate upon which we formerly passed. The charge of the trial court submitted that question to the jury, telling them that plaintiffs could not recover if deceased was in fact lying upon the track. For this court to disturb the verdict for such a reason as this, it must be able to say that the evidence established the fact relied on so conclusively that the jury could not reasonably have found that it was not satisfactorily proved. This we cannot say.

Another position taken by counsel for the defendant, a decision of which was not involved in our answers to the certified questions, is that the deceased, even when treated as a licensee walking upon the track, is conclusively shown to have been guilty of contributory negligence, in that the evidence shows that he could have walked outside of the rails and out of danger as conveniently as upon the track. If the fact thus assumed could be treated by us as shown beyond dispute, we should feel constrained to hold with the defense. An implied permission, such as is claimed, to use a railroad track as a footpath may relieve the person enjoying it of the imputation of being a trespasser, but it does not relieve the place of its inherent dangers, nor exempt the traveler from the duty to act with ordinary prudence. When he voluntarily chooses the dangerous pathway instead of a safe one beside it we can see no escape from the conclusion that he is guilty of negligence, if there be no justifying or excusing circumstances. The authorities upon the subject are cited and discussed in the opinion of the Supreme Court of Kansas in the case of *A., T. & S. F. Ry. Co. v. Schwindt*, 72 Pac. 573. See, also, *Lewis v. G., H. & S. A. Ry. Co.*, 73 Tex. 507, 11 S. W. 528; 5 Thompson on Neg. § 6247. But the question as to the negligence of the deceased in walking upon instead of outside the track was submitted to the jury and found against the defendant. And here, as upon the other points, the power of this court is limited to the inquiry whether or not the evidence conclusively established the fact relied on; and we find that there is evidence that there was not space to walk between the track and the edge of the embankment sufficient to have put the deceased beyond the reach of passing trains. The question was therefore one for the jury.

The trial court excluded from the jury some of the evidence offered by the defendant in its attack upon the credibility of Andrews, one of the plaintiff's important witnesses, which we are of the opinion should have been admitted. As the chief question is as to its relevancy, which depends upon a rather

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exceptional state of facts, a somewhat detailed statement is necessary to show its bearing upon the issues in the case. For this purpose alone and not as a criticism of the witness' testimony nor the expression of an opinion as to the weight the impeaching evidence should have, the following statement is made. The testimony of Andrews was produced for the first time at the trial now under review, by several depositions taken in the summer and autumn of 1903, the death of plaintiff's husband, J. L. Matthews, having occurred in Ft. Worth in May, 1899, and the suit having been brought in Grayson county in September of the same year. There have been several trials of the cause and two appeals prior to the last trial. Upon the second appeal the Court of Civil Appeals of the fourth district had reversed a judgment in favor of the plaintiff, holding that the evidence showed that Matthews was struck while lying upon the track, and was therefore guilty of contributory negligence. That this was the case the evidence adduced by defendant in all of the trials tended to prove, while plaintiff attempted to show that Matthews, when struck, was walking on the track, in the exercise of a privilege to do so acquired by the public. As tending to support the defense by furnishing a reason for his lying upon the track the question whether or not deceased was intoxicated became important, while the identity of Matthews with a person seen walking upon the track a few minutes before the train passed that killed Matthews was a circumstance essential to plaintiff's case, the Court of Civil Appeals having held that the evidence then in the record was not sufficient to show such identity nor to make an issue with defendant's evidence. Upon the question whether or not Matthews was drunk, evidence was introduced tending to show that at times he drank to the point of intoxication and that on the night before he was killed he was in that condition and engaged a room in a hotel and left saying he would return and occupy it, but did not do so; and, besides the testimony of Andrews, there is nothing to show his whereabouts or his condition until his body was found upon defendant's railway the next morning between 6 and 7 o'clock, unless he was the person before referred to as walking upon the track. Andrews was clerk in another hotel and, his statement given with considerable detail, is in substance that about 11 o'clock of the night preceding the killing, a man, who gave his name as J. L. Matthews, engaged, paid for and occupied a room in the hotel for the night and, shortly before 6 o'clock next morning, left, going in the direction of some camping grounds near to defendant's railroad at the point where the body was found, to which witness, at his request, directed him. The witness stated that Matthews was then sober, and gave a description of him by size and dress which measurably corresponded with that which had been given by another witness of the person seen walking on the track and which, in the opinion of the Court of Civil Appeals on the present appeal, established that they were the same. The importance of his testimony is apparent.

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The defense, by cross-examination and evidence offered, attempted to expose the statement of this witness as a fabrication. On cross-examination the witness stated that he did not have Matthews to register at the hotel because he was drinking but inquired for and got his name in order to register it and neglected to do so; that he heard the evening of the next day or the day after of Matthews having been killed and read an account of it in a newspaper, but, prior to his statement to plaintiff's agent, referred to below, had never told his wife, the proprietor of the hotel, or any one else, of the facts stated, except that he had talked about it a few times with one F. W. Wilkinson. It further appears from his testimony that, at some time not shown, one Bell made some inquiry of him as to his knowledge of the matter, telling him that he was looking up evidence for plaintiff, and that he gave Bell no satisfaction, and told him nothing. He gives his reasons for his silence, which, as their sufficiency will be a question for the jury, and not for this court, need not be stated. He further testified that his first disclosure of the facts to plaintiff was made to another agent representing her, who came to Ft. Worth and stopped at the lodging house kept by his wife four or five nights in August, 1903, in a conversation that came up between them about people being killed by railroads, which brought to his mind the case of Matthews. It further appears that during the same month interrogatories were propounded to him by plaintiff which, with the cross-interrogatories of the defendant, were filed in the court at Sherman, where the cause was pending, and upon them the defendant took out a commission to Tarrant county, where the witness lived, for the purpose of having his answers taken; that on the same morning, and after this commission was issued, the witness received a telegram from the agent of plaintiff who had obtained his statement and who was at Sherman requesting the witness to go to Dallas and call him (the agent) up, that he left for Dallas at 12 o'clock, spent the evening there and talked to the agent over the telephone, all that the latter said being that the defendant had obtained a commission to take his deposition, and that he might as well return as they would take his deposition anyway, and that plaintiff wanted to take it first.

The evidence to show these facts was admitted, and the defendant offered to show by further cross-examination of Andrews that on the day Matthews' body was found, or the day after, he read accounts in the newspapers and heard conversations of people about the hotel to the effect that it was suspected that Matthews had been foully dealt with and that the police were making an investigation. This was excluded, on the objection that it was not the best evidence of what the newspapers contained, and was hearsay, irrelevant, and immaterial. The defendant also proffered testimony to show that before Andrews gave his deposition it had been reported in a newspaper in Ft. Worth and was generally believed there that the man Wilkinson whom

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Andrews claimed to have told the facts to which he testified had been killed in Chicago; that Andrews had stated in his deposition that he did not know where Wilkinson was, and that the last he knew of him was that he was working at a hotel in Ft. Worth, but had told a witness who inquired of him concerning Wilkinson that it was his (Andrews') understanding that Wilkinson was dead and had been killed in Chicago; and, in connection with this, defendant put Wilkinson, who was, in fact, alive, upon the stand and offered to prove by him that Andrews had never communicated to him the facts stated by him concerning Matthews. This evidence was excluded upon the objection that it was immaterial, irrelevant, and hearsay.

The objection that the rumors and the reports in newspapers about Matthews' death, the suspicions concerning it, and the proposed investigation of it were hearsay would plainly be good, had it been offered as evidence of the facts reported, but such was not its object. Such significance as it had consisted wholly in the suggestions to speak thus brought to Andrews' mind to intensify the probability that he would have broken his silence had he known the facts to which he now testifies. If the fact that he had never communicated his knowledge was itself relevant, circumstances were equally so which tended to increase its force by strengthening the inference sought to be raised that one knowing such facts would naturally have mentioned them under such circumstances. But apart from the question as to their admissibility as affirmative evidence for the defense, the inquiries about these facts were addressed to the witness himself in cross-examination and this we think the defendant had the clear right to do. If the evidence of Wilkinson that Andrews had never mentioned the subject to him was admissible, the purpose being to thereby support the attack upon the credibility of Andrews' story, it was likewise admissible to intensify the force of that evidence by showing that Andrews believed that Wilkinson was dead when in his deposition he mentioned Wilkinson as the only person to whom he had ever communicated the facts known to himself. The question as to the admissibility of the rejected evidence therefore depends upon the further questions, whether or not it was competent for the defendant to show (1) that Andrews had never told the facts of which he claimed to have had knowledge to any one, and (2) when Andrews asserted that he had told them to one person, to show that he had never done so.

It is contended for plaintiff and was held by the Court of Civil Appeals that, while the defense was permitted to cross-examine the witness as to communications made, the facts thus inquired about were collateral and irrelevant to the issues in the case and that it was not permissible to contradict his answers about them, the contention resting upon the familiar rule that a witness who has been asked on cross-examination if he has not made specified statements concerning irrelevant matters, and has denied making them cannot be contradicted by evidence that he has done so.

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But that character of testimony tends only to show an inconsistency between two statements neither of which bears upon facts in issue in the case; in other words, to show that the witness, in some particular instance, has been guilty of falsehood about a matter immaterial to the case on trial. It is not permitted for the reasons that witnesses are not expected to come prepared to sustain all the statements they have made upon subjects not involved in the controversy, and because its admission would involve the trial of too many issues as to the truth of the statements the determination of which would at last have little effect upon the decision of the cause. The effort here is to establish the falsity of the witness' testimony material to the case by circumstances, one of which is that that did not happen which would naturally be expected to have happened if the tale were true, i. e., an earlier disclosure of the facts known to the witness. This evidence is directed at the very facts in issue in the case and not to the proof of irrelevant facts. When the existence of facts material to a plaintiff's case are put in issue by the defense, the truth of the testimony of witnesses to those facts is also put in issue; and evidence which has a tendency to show the untruth of such testimony is as relevant to the issues as testimony of other witnesses denying that the facts exist. As was said by Judge Stayton in *Evansich v. G., C. & S. F. Ry. Co.*, 61 Tex. 28: "As all issues of fact must be determined by the testimony of witnesses, it would seem that any fact which bears upon the credit of a witness would be a relevant fact and this whether it goes to his indisposition to tell the truth, his want of opportunity to know the truth, his bias, interest, want of memory, or other like fact."

Evidence therefore which bears upon the story of a witness with sufficient directness and force to give it appreciable value in determining whether or not that story is true cannot be said to be addressed to an irrelevant or collateral issue. It is directed to the issue as to the existence of the material facts to which the witness has testified. The evidence that a witness has kept silent concerning material facts is often as relevant and sometimes as strong as an affirmative statement contradictory of his testimony would be. The relevancy of evidence of this character, therefore, is not tested by the rule applied by the Court of Civil Appeals, but by its probative force or value. That may be so slight as to make the fact offered irrelevant in the legal sense, and when this is true the circumstances should be excluded as too remote. It is a very common thing in the trial of cases to show that a witness testifying to some fact has never before disclosed his knowledge, or that he has failed to do so on some particular occasion. The value of such a fact depends upon the strength of the presumption or expectation that the witness would have disclosed his knowledge had he possessed it. When it is shown that he was silent when it was his duty to speak, his omission may have great effect in weighing his testimony. So if it can be made to appear, that while there was no duty to

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speak, the fact was of such a nature or the circumstances such that one situated as the witness was, would, in the natural order of things, have mentioned the fact if within his knowledge, his failure to do so bears sufficiently upon the question of his veracity to entitle it to admission. *State v. McKinney*, 31 Kan. 570, 3 Pac. 365; *Alabama G. & S. R. Co. v. Brooks*, 135 Ala. 401, 33 South. 181; *State v. Morton*, 107 N. C. 890, 12 S. E. 112, 10 L. R. A. 527; *State v. Burton*, 94 N. C. 947; *State v. McQueen*, 46 N. C. 177. Many authorities are cited in the "Encyclopædia of Evidence," by Camp & Crowe, vol. 7, pp. 152-155. They are generally cases in which witnesses testifying to facts are shown to have omitted to disclose them on some particular occasions when disclosure was naturally called for by the circumstances, and in some of them such evidence was rejected because the occasion did not appear to have called for any statement.

If the fact of Andrews' silence stood alone it could hardly be said to have sufficient significance, of itself, to require the trial court to allow more than the cross-examination respecting it. The mere fact that the clerk at a hotel has not said that a particular guest spent a night there, although that guest was, to his knowledge, killed the next day, when he did not know that the fact was of any importance, could hardly be justly regarded as affecting his veracity. But other circumstances were adduced and these the defendant was entitled to have the jury consider, and along with them the facts drawn out in cross-examination that for so long a time he had never mentioned the facts to those nearest to him but had told them to a person supposed to be dead. The course which the testimony took gave to this fact greater pertinency than it might otherwise have had. There is such connection between the circumstances brought out by the defense as to make it necessary that all of them be considered together in order that their combined force may be determined, the condition being one often seen in cases of circumstantial evidence where facts unimportant by themselves acquire force from their relation to others. When all of the facts are examined together the question whether or not Andrews in fact told Wilkinson became of more or less importance. His statement that he had done so if left uncontradicted might be regarded by the jury as supporting his testimony. *Insurance Co. v. Eastman*, 95 Tex. 37, 64 S. W. 863; 1 Greenl. Ev. (16th Ed., by Wigmore) § 469b. It was therefore competent we think for the defendant to show that he had never made the communication claimed by him. *State v. McKinney*, *supra*. The effort of the defendant was, not to show a statement to Wilkinson contradictory of his testimony, but to maintain its contention that he had never told any one; and that fact being relevant, the defendant had the right, we think, to meet his apparent effort to break its force.

During the examination of Wilkinson he stated before the jury that he had never heard of a man named Matthews being run over and killed at the place where plaintiff's husband was killed, and it is contended that this showed all that the excluded testi-

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mony would have shown and renders the ruling of the court harmless. If the exclusion of this statement was not involved in the ruling which the court made, which is not clear, it is nevertheless true that the defendant had not the right to insist nor the jury the right to consider that it had the effect, now sought to be ascribed to it, of supplying proof of the further fact, proof of which the court expressly refused to admit on the ground that it could not be considered as evidence. To so treat it would imply the right of a jury to disregard the ruling of the court.

The assignments of error based upon the use in argument by plaintiff's attorney of a part of a deposition which by oversight had not been offered in evidence and upon the fact that newspaper accounts of the case were read by the jury need not be discussed as they present matters which will not affect another trial.

All of the other grounds of error have had careful attention and in none of them has there been found further reason for reversing the judgment.

Reversed and remanded.

KANE v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, June 20, 1906.)

[78 N. E. Rep. 485.]

Negligence—Contributory Negligence—Imputed Negligence—Driver of Vehicle.*—In an action for personal injuries to plaintiff while riding on a pung near a railroad track, he is not entitled to recover, if either his own negligence or that of the driver of the pung contributed to the happening of the accident.

Exceptions from Superior Court, Suffolk County; Wm. Cushing Wait, Judge.

Action by one Kane against the Boston Elevated Railway Company for personal injuries. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

Malachi L. Jennings, for plaintiff.

R. A. Sears and John E. Hannigan, for defendant.

SHELDON, J. There is no occasion to go over the evidence in this case in detail. It could lead to no other conclusion than that the driver of the pung in which the plaintiff was sitting

*For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Alabama Great Southern R. Co. v. Clark* (Ala.), 19 R. R. R. 170, 42 Am. & Eng. R. Cas., N. S., 170; foot-notes appended to *Dryden v. Pennsylvania R. Co.* (Pa.), 19 R. R. R. 168, 42 Am. & Eng. R. Cas., N. S., 168; *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714; foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168.

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drove so near the defendant's tracks as to cause the plaintiff's knees to strike against the car which was passing in the opposite direction. Under the circumstances of this case the plaintiff cannot recover if either his own negligence or that of the driver contributed to the happening of the accident. *Evensen v. Lexington & Boston Street Railway*, 187 Mass. 77, 78, 72 N. E. 355; *Yarnold v. Bowers*, 186 Mass. 396, 398, 71 N. E. 799, and cases there cited. Even if there had been evidence of any negligence in the management of the defendant's car, yet it could not be said that such negligence was the cause of the accident. The plaintiff himself testified that the trouble was that the driver of the pung drove too near the tracks and that even if the car had stopped the driver of the pung would have driven him (the plaintiff) against the car; and there was no other testimony in the case inconsistent with this. The circumstances are not like those disclosed in *Aiken v. Holyoke Street Railway*, 180 Mass. 8, 12, 13, 61 N. E. 557. The verdict for the defendant was rightly ordered.

Exceptions overruled.

HALLORAN v. WORCESTER CONSOL. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Worcester, May 17, 1906.)

[78 N. E. Rep. 381.]

Street Railroads—Vehicles—Rights in Street—Care Required.*—In general, a street railway company stands in respect to the use of the street on exactly the same footing as the driver of any vehicle; each being bound to use due care to avoid collision, and neither being entitled to assume that the other will keep out of the way.

Same—Action for Injuries—Burden of Proof.—In an action for injuries to plaintiff while riding in a wagon by collision with a street car, the burden was on plaintiff to show due care on his part and negligence on the part of the street car company.

Same—Negligence—Contributory Negligence—Question for the Jury.—In an action for injuries to plaintiff by collision between the wagon in which he was riding and a street car, evidence held to require submission of defendant's negligence and plaintiff's contributory negligence to the jury.

Exceptions from Superior Court, Worcester County.

Action by John J. Halloran against Worcester Consolidated

*For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Latson v. St. Louis Transit Co. (Mo.)*, 19 R. R. R. 845, 42 Am. & Eng. R. Cas., N. S., 845; *Foult v. Wilmington City Ry. Co. (Del. Supr. Ct.)*, 19 R. R. R. 541, 42 Am. & Eng. R. Cas., N. S., 541; *Smith v. Minneapolis St. Ry. Co. (Minn.)*, 19 R. R. R. 536, 42 Am. & Eng. R. Cas., N. S., 536; *Boudwin v. Wilmington City Ry. Co. (Del. Supr. Ct.)*, 19 R. R. R. 564, 42 Am. & Eng. R. Cas., N. S., 564; *Kerr v. Boston Elevated Ry. Co. (Mass.)*, 19 R. R. R. 533, 42 Am. & Eng. R. Cas., N. S., 533; foot-notes appended to *Ablard v. Detroit United Ry. (Mich.)*, 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722; foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth (Ark.)*, 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168.

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Street Railway Company. At the close of plaintiff's evidence the court directed a verdict for defendant, and plaintiff brings exceptions. Sustained.

John R. Thayer, Arthur P. Rugg, Henry H. Thayer, and Michl. T. Carrigan, for plaintiff.

F. H. Dewey, Chas. C. Milton, and Chandler Bullock, for defendant.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff in consequence of the wagon on which he was riding being struck by an electric car of the defendant. At the close of the evidence for both sides, the judge of the superior court who heard the case directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

The accident occurred soon after 1 o'clock in the afternoon of December 17, 1903, at the junction of Piedmont street and Chandler street in Worcester. The former street is on a level grade and runs north and south. The latter street has a sharp descending grade towards Piedmont street, and runs east and west. On Chandler street is a line of the defendant's tracks. Shortly before the accident the plaintiff had been invited by the driver of the wagon to get upon it. It appeared in evidence that upon the corner of Piedmont street and Chandler street, on the side from which the defendant's car approached, there was a large brick factory, and that it was impossible for one proceeding in the direction in which the plaintiff was going, to obtain a view of Chandler street and the car tracks of the defendant. The distance from the building to the nearest rail was about 14 feet.

There was evidence that the car struck the left front wheel of the wagon. Both the plaintiff and the driver testified that while on Piedmont street they were going about four miles an hour; that before crossing Chandler street the driver slowed up; that both looked and saw no car approaching, and listened but heard nothing. The driver further testified that as the seat of the wagon passed the cross-walk on Chandler street over Piedmont he first saw the car approaching, and at that time his horse's feet were between the rails of the track; that he turned his horse to the left, and the car struck the wheel.

There was a conflict of evidence as to the speed of the car, and as to whether the gong was sounded.

We are of opinion on the evidence in the case that the questions of due care on the part of the plaintiff and the driver of the wagon, and of negligence on the part of the motorman of the car were for the jury.

In *Scannell v. Boston Elevated Ry.*, 176 Mass. 170, 173, 57 N. E. 341, it is said: "With some exceptions pointed out in *Driscoll v. West End St. Ry. Co.*, 159 Mass. 142, 145, 34 N. E. 171, and which are not material to this case, the defendant stands in respect to the use of the street on exactly the same footing as the driver of any other vehicle. Each is bound to use

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due care to avoid coming in contact with the other, and neither is entitled to assume that the other will keep out of his way."

The general rule where a collision occurs between an electric car and a wagon at intersecting streets is to leave the question of due care on the part of the plaintiff and of negligence on the part of the defendant to the determination of the jury. *Lahti v. Fitchburg & Leominster St. Ry.*, 172 Mass. 147, 51 N. E. 524; *Kelly v. Wakefield & Stoneham St. Ry.*, 179 Mass. 542, 61 N. E. 139; *Evensen v. Lexington & Boston St. Ry.*, 187 Mass. 77, 72 N. E. 355; *McCarthy v. Boston Elevated Ry.*, 187 Mass. 493, 73 N. E. 559; *Orth v. Boston Elevated Ry.*, 188 Mass. 427, 74 N. E. 673.

Of course the burden of proof is on the plaintiff in these cases to show due care on his part and negligence on the part of the defendant; and if there is no evidence of such care on his part or of negligence on the part of the defendant, the plaintiff is not entitled to recover, and this may be ruled as matter of law. The defendant relies upon four cases; *Kelly v. Wakefield & Stoneham St. Ry.*, 179 Mass. 542, 61 N. E. 139; *Hurley v. West End St. Ry.*, 180 Mass. 370, 62 N. E. 263; *Dunn v. Old Colony St. Ry.*, 186 Mass. 316, 71 N. E. 557, and *Donovan v. Lynn & Boston R. R.*, 185 Mass. 533, 70 N. E. 1029. In the first of these cases the question of the plaintiff's due care was held to be for the jury. In the second and third cases, the evidence showed that the plaintiff exercised no care whatever, and it was held that the plaintiff could not recover. In the last case a woman attempted to cross the street railway tracks 10 feet in front of an electric car, and it was held that she could not recover. The case at bar is clearly distinguishable.

Exceptions sustained.

JAMES QUIRK MILLING COMPANY v. MINNEAPOLIS & ST. L. R. Co.

(Supreme Court of Minnesota, May 4, 1906.)

[107 N. W. Rep. 742.]

Railroads—Fires Set by Locomotives—Limiting Liability.*—A railway company, being under no legal obligations to grant to any one the privilege of building an elevator upon its right of way, may, without violating any rule of public policy, grant the privilege by contract on condition that it shall not be responsible for damages caused by fires resulting from the operation of its engines.

Appeal from District Court, Hennepin County; Frank C. Brooks, Judge.

Action by the James Quirk Milling Company against the Minneapolis & St. Louis Railroad Company. From an order

*See foot-notes appended to *Cincinnati, etc., Ry. Co. v. Saulsbury* (Tenn.), 19 R. R. R. 202, 42 Am. & Eng. R. Cas., N. S., 202.

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sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Wm. H. Hallam, for appellant.

John I. Dille, for respondent.

ELLIOTT, J. The appellant under a contract with the railway company erected a grain elevator upon its right of way. The building was destroyed by fire negligently scattered by the company's locomotives. The action was brought to recover the resulting damages, and the trial court sustained a demurrer to the complaint. The appeal is from this order.

The elevator was constructed under a contract between the parties which contained the following provision: "In consideration of the rights hereby acquired the second party agrees * * * to protect, save harmless, and indemnify the railway company, its successors and assigns, from liability to any person, corporation, or company, for or on account of any loss or damage by fire communicated by or escaping from any locomotive, engine, or car, or resulting in any manner from the construction or operation of said track." The appellant contends that this contract is against public policy and therefore void. This involves the denial of the right of the parties to enter into such agreement. Public policy requires that the right to contract shall be preserved inviolate in ordinary cases. It is denied only when the particular contract violates some principle which is of even more importance to the general public. As said by Sir George Jessel, M. R., in *Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 462, 465, 44 L. J. Ch. 705: "It must not be forgotten that you are not to extend arbitrarily those rules, which say that a given contract is void as being against the public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider, that you are not likely to interfere with the freedom of contract." In *Baltimore, etc., Ry. Co. v. Voigt*, 176 U. S. 505, 20 Sup. Ct. 387, 44 L. Ed. 560, the court said: "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare." It follows that the party who asserts that a particular contract is against public policy has the burden of proving the same. *Printing, etc., Co. v. Sampson*, supra; *Rousillion v. Rousillion*, 14 Ch. Div. 351; *U. S. v. Trans-Missouri, etc., Co.*, 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73; *Hartford Fire Ins. Co. v. Chicago*

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Railway, etc., Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Stewart v. Transportation Co.*, 17 Minn. 372 (Gil. 348).

The appellant assumes that there is a general rule of law which forbids a party to protect himself by contract against damages resulting from his own negligence. But this is true only when the contract protects him against the consequences of a breach of some duty which is imposed by law. Generally a person may waive the right of action which he has against another for an injury received from the negligence of the latter, provided the contract of waiver is supported by a consideration deemed valuable by law and procured without mistake or fraud, such as would avoid other contracts. *Thompson, Negligence*, vol. 1, § 182. In *Hartford Ins. Co. v. Chicago, etc., Ry. Co.*, 175 U. S. 91, 98, 20 Sup. Ct. 33, 36, 44 L. Ed. 84, Mr. Justice Gray, after stating the rule applicable to public carriers, said: "The plaintiff further insisted that the same rules apply universally and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct. But the only authority cited which supports this proposition is a general statement in *Cooley on Torts*, 387, and an obiter dictum in *Johnson's Adm'x v. Richmond, etc., Ry. Co.* 86 Va. 975-978, 11 S. E. 829, and it is certainly too sweeping. Even a common carrier may obtain insurance against losses occasioned by the negligence of himself or his servants, or may by stipulation with the owner of the goods carried have the benefit of such insurance procured thereon by such owner." *Mpls., etc., Ry. Co. v. Insurance Co.*, 64 Minn. 61, 69, 66 N. W. 132; *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013. The right to insure against loss by fire occasioned by the negligence of the insured is no longer questioned. *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 438, 9 Sup. Ct. 469, 32 L. Ed. 788; *Kerr, Ins.* p. 375. A stronger illustration is found in the recognized business of insuring employers of labor against damages resulting from personal injuries occasioned by the negligence of the insured.

Exceptions to the general rule which protects the freedom of contract are made in some instances, especially such as involve the relation of master and servant and the transactions of railway companies when acting as public carriers of persons and property. Positive and peremptory duties are imposed upon public carriers. Public policy requires that contracts which relieve from these absolute duties shall be held null and void. The law imposes upon a railway company the absolute duty to operate its railways, to employ suitable men to operate them, and to exercise ordinary care to furnish them a reasonably safe place to work and with reasonably safe machinery and appliances with which to perform their work. The obligation is imposed by law, and does not arise out of contract. Any breach of this duty,

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therefore, is a violation of the law which imposes the duty. It follows that a contract which exempts the carrier from damages resulting from negligence in the discharge of these duties is void, because it relieves it of an absolute duty which the law imposes upon it, and because it unreasonably endangers the lives of employees and passengers. The parties to such contracts do not stand upon an equal footing. The law imposes upon the company the absolute duty to accept passengers and freight when offered, and to carry the former with the utmost and the latter with ordinary care. The traveler is often obliged to travel and the shipper to send his goods by railway. A person cannot stop to settle the terms and to negotiate a contract every time he desires to use a railway. On the other hand, a railroad, with its trained employees and monopoly of transportation facilities, has the power to exact any contract it desires. This inequality in the situation of the parties would, if permitted, enable the company to obtain unfair contracts, and the fact that a contract which exempts the company from liability for negligence relieves it from an absolute duty imposed by law and increases the danger to the lives and property of the people constitutes the reason for the rule that such contracts are against public policy. *Hartford Fire Ins. Co. v. Chicago, etc., Ry. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

Entirely different conditions are presented by the case at bar. In making the lease in question the railway company was dealing with individuals in reference to the use of its property only remotely, if at all, connected with its business as a common carrier. No law imposed upon it the duty of leasing a portion of its right of way to the appellants. A railway holds its station grounds and right of way for the public use for which the company was incorporated, "yet it is its private property, and to be occupied by itself and by others in the manner which it may consider best fitted to promote or not to interfere with the public use. It may in its discretion permit them to be occupied by others with structures convenient for the receiving and delivering of its freights upon its railroads, so long as a free and safe passage is left for the carriage of passengers and freight." *Hartford Ins. Co. v. Chicago, etc., Ry. Co.*, 175 U. S. 92, 99, 20 Sup. Ct. 36, 44 L. Ed. 84; *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Osgood v. Central Vermont Ry. Co.*, 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930. The laws of this state authorized the condemnation of a part of the right of way of a railway company for the erection of a public warehouse and elevator. Chapter 64, p. 177, Gen. Laws 1893; Gen. St. 1894, §§ 7724-7732; Rev. Laws 1905, §§ 2106-2113. But the appellant did not resort to this procedure, which would have made its elevator a public enterprise and thus subject to public regulation. *Stewart v. N. P. Ry. Co.*, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427. It chose rather to enter into a private contract with the railway company and to release it from liability for damages occasioned by fire which might escape from its

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engines. For this waiver of the right of action it must have received some benefit, which it deemed the equivalent of the right of action which it waived. The company was under no legal obligation to make the lease. It might leave the appellant to its right to proceed under the statute and accept the obligations arising out of the relation thus created. The company would not be liable for damages to property placed upon its right of way by strangers without its permission, caused by fires occasioned by its want of ordinary care. Having the right to refuse to make the contract, it might stipulate for exemption from damages caused by its negligence in setting fire to the property which the lessee placed upon the leased premises. Placing the building upon the right of way was an inconvenience to the railway company and increased the danger of fire to its own property. In the absence of the stipulation in question, the risks and liabilities of the company would have been materially increased. As the contract in no way relieves the railway company from the discharge of any absolute duty which it owes to the public or to any citizen, it is not against public policy, and is therefore binding upon the parties. The authorities, without exception, sustain this view. Elliott on Railroads, vol. 3, § 1236; Griswold v. Ill. Cent. Ry. Co., 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; Stephens v. Southern Pac. Ry. Co., 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; King v. Southern Pac. Ry. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755; Kan. City, etc., Ry. Co. v. Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Am. & Eng. Ann. Cas. 883; Greenwich Ins. Co. v. Louisville, etc., Ry. Co. (Ky.) 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313; Wabash Ry. Co. v. Ordelheide, 172 Mo. 436, 72 S. W. 684; Hartford Fire Ins. Co. v. Chicago, etc., Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, same case on appeal 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; Baltimore, etc., Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; Osgood v. Cent. Vt. Ry. Co., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930; Richmond v. New York, etc., Ry. Co., 26 R. I. 225, 58 Atl. 767; Woodward v. Ft. Worth, etc., Ry. Co. (Tex. Civ. App.) 79 S. W. 896; Mann v. Pere Marquette Ry. Co. (Mich.) 97 N. W. 721. Cf. Quimby v. Boston & Me. Ry. Co. (Mass.) 23 N. E. 205, 5 L. R. A. 846; Russell v. Pittsburg, etc., Ry. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214; Tex. & Pac. Ry. Co. v. Watson, 190 U. S. 287, 293, 23 Sup. Ct. 681, 47 L. Ed. 1057.

The order appealed from is affirmed.

LONG *et al.* v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Oklahoma, Sept. 5, 1905. Rehearing Denied June 11, 1906.)

[86 Pac. Rep. 289.]

Dead Bodies—Mutilation—Damages—Mental Pain and Anguish.*—

The parents of an infant child are not entitled, under the law, to recover damages for mental pain and anguish, occasioned by the mutilation of the dead body of such infant.

Hainer and Pancoast, JJ., dissenting.

(Syllabus by the Court.)

Error from District Court, Grant County; before Justice James K. Beauchamp.

Action by Charles G. Long and others against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiffs for \$65, and they bring error. Affirmed.

C. S. Ingersol and *W. H. C. Taylor*, for plaintiffs in error.

M. A. Low and *Mackey & Mackey*, for defendant in error.

BURWELL, J. This is an action for damages against the appellee. Charles G. Long and Minnie B. Long were the parents of Mason Long, an infant son of 13 years, who died on April 12, 1904. His parents, desiring to bury him in the family cemetery at Marshfield, Ind., purchased tickets for themselves, and also a ticket for the body of the deceased, from Pond Creek, Okl., to that place, over the defendant's road. The petition alleges that the defendant, in placing the casket in the car, handled it in so negligent and careless a manner that it fell on the ground, thereby breaking the casket and outer box and mutilating and disfiguring the body of their dead son; that the plaintiffs were compelled to expend the sum of \$65 in Kansas City for the preparation of the body for burial, and to have the casket repaired, all of which was occasioned by the negligence of the defendant company; that by reason of the negligent acts of the defendant, the plaintiffs suffered great mental distress. Judgment is prayed in the total sum of \$1,565. On the trial, the defendant offered to confess judgment for \$65, the amount of the actual damages, but objected to the introduction of any evidence as to mental suffering. The court sustained the objections. The jury returned a verdict for the \$65, for which

*For the authorities in this series on the subject of the elements of the damages recoverable by parents for the death or injuries of their children, see foot-notes appended to *Bube v. Birmingham Ry., etc., Co.* (Ala.), 13 R. R. R. 380, 36 Am. & Eng. R. Cas., N. S., 380.

For the authorities in this series on the question whether there may be recovery on account of mental suffering, in negligence cases, see foot-notes appended to *Kelley v. Ohio River R. Co.* (W. Va.), 19 R. R. R. 807, 42 Am. & Eng. R. Cas., N. S., 807; foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; *Eller v. Carolina & W. Ry. Co.* (N. Car.), 18 R. R. R. 609, 41 Am. & Eng. R. Cas., N. S., 609.

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judgment was entered. The plaintiffs have appealed to this court. The record and briefs present the sole question as to whether or not a recovery can be had for mental suffering in a case of this kind.

The cutting, bruising, or disfiguring of the dead body of a child could not fail to cause great mental distress to those responsible for its existence, and whose hopes have been disappointed by its loss. Indeed, language is incapable of conveying the pain and anguish that such an act would produce in the mind of a tender and loving parent. But when done either maliciously or negligently, the injury is one for which the law has failed to provide compensation in dollars and cents, and, in announcing this rule, we have not overlooked the declarations to the contrary by some courts of high standing. These decisions, however, indicate an effort to interpolate into the law for the punishment of a wrong, a remedy at the sacrifice of legal principles, as declared by the judges of England, from whence our rules of human conduct were adopted, and still obtain in this territory, except as modified by statutory enactment. The courts which declare the right to recover for mental anguish in a case of this character do so upon the assumption that a human corpse is property; not property in the general acceptation of that term, but a sort of quasi property—that is, that it so resembles property, in the right of the relatives to control and direct its interment, and to have it kept inviolate from negligent or malicious injury, that the law of the rights of property and the remedy for the destruction thereof should be extended to such cases, measuring the injury and compensation by the mental suffering of the living occasioned by the desecration of the dead. The disposition to protect the bodies of the departed, as indicated by these decisions, appeals to our higher sensibilities, but the rules announced by these courts authorizing recovery for mental anguish alone is, in our opinion, largely the result of sentiment, and is in conflict with the common law of the land. It is true that in some countries the bodies of deceased persons have been seized and sold for debt, and, under such a law, they would be property. Greatly to their credit, England and the United States have always considered the decent burial of the dead of more importance than the payment of the debtor's claims.

The case of *Burney v. Children's Hospital in Boston* (Mass.) 47 N. E. 401, 61 Am. St. Rep. 273, 38 L. R. A. 413, is perhaps the strongest case on the side of appellant. The court said: "A father of a child, who is its natural guardian, has such a right to its dead body that he may maintain an action against one to whom he intrusted the child for treatment, and who, without his consent, performed an autopsy on the dead body." The cases cited in support of the decision just referred to are not in point, except in so far as they deal with the right of the relatives or administrator to control, care for, and bury the dead body. They do not suggest a remedy in a court of law for mental suffering as a result of an infringement of those rights.

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The case of *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, cited in the opinion, did not involve the question of mutilation of a corpse. The defendant had entered upon the lot of plaintiff in a cemetery and removed therefrom the dead body of his (plaintiff's) child. The action was in the nature of trespass quare clausum fregit, and the injury was to the plaintiff's close, by breaking and entering and digging the soil. The exhuming of the dead body, and what was done with it, were only circumstances which the jury were permitted to consider in determining as to whether the trespass was willful or characterized by gross carelessness. In the opinion, the court said: "He who is guilty of a willful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. In such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespass to real estate as well as in other actions of tort." The court expressly held that a dead body is not property and, after burial, the only remedy for disturbing it is an action for trespass quare clausum; citing, with approval, 2 Blackstone's Comm. 429. In the case of *Beam v. Cleveland, C., C. & St. Louis Ry. Co.*, 97 Ill. App. 24, it was held that one can, where he pays for the transportation thereof, recover damages for injury to the remains of his dead brother, occasioned by the negligence of the railroad company. This decision, however, is simply a statement of the rule, and the case is not argued from general principles, nor is it supported by a citation of authorities.

Our attention has also been directed to the following cases, which sustain the doctrine of recovery for mental anguish, caused by the delay in shipment of or injury to a dead body: *Mattie Hale v. Bonner et al.* (Tex.) 17 S. W. 605, 14 L. R. A. 366, 27 Am. St. Rep. 850; *Wells Fargo Express Co. v. Fuller* (Tex. Civ. App.) 35 S. W. 824, and *Louisville & Nashville R. R. Co. v. George W. Hull* (Ky.) 68 S. W. 433, 57 L. R. A. 771. In the last case cited, the learned justice who wrote the opinion said: "The right to recover for mental anguish for failure to deliver a telegram in the class of cases referred to [speaking of the failure to deliver a message advising the party addressed of the death of a near relative] was upheld in *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880, and, after reconsideration, this case was adhered to in a number of cases. * * * No sound distinction can be maintained between the telegraph cases and this case. They rest upon the principle that damages naturally resulting from a wrongful act, and fairly within the reasonable contemplation of the parties, may be recovered." The other two (Texas) cases cited also state that they involve the same principle as the telegraph cases. This conclusion we concede, and the point was decided by this court against the contention of the appellants in the case of *Butner v. Western Union Telegraph Co.*, 2 Okl. 234, 37 Pac. 1087. The telegram was delivered to the defendant company for trans-

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mission to plaintiff and, if delivered, would have informed him of the death of his daughter, the failure of which prevented him from giving her a proper burial; he not having heard of her death until two days thereafter. Mr. Justice Burford (now Chief Justice) wrote the opinion, and after citing and reviewing the authorities (and there is quite a large list of them) says: "Damages for mental pain and suffering alone, occasioned by the negligence of a telegraph company in failing to deliver a message announcing the death of a relative, cannot be recovered." And: "If the authorities holding the affirmative of this proposition presented uniformity of the result obtained, and harmony in the reasoning attempted in support of it, the array would be formidable. Their force, however, is weakened by self-evident disparity of reasoning and conflict of result. Some hold that mental anguish is not a cause of action, but is merely a dependent incident to be taken into consideration in addition to pecuniary damages shown, while others assert that it is an independent cause of action, a distinct element of damage. Some hold that negligence sufficient to uphold a recovery must be willful; others, that simple negligence will suffice. Some uphold the recovery on the ground of punishment, others upon the ground of compensation, and some blend both grounds. This conflict exists not only between the courts of the different states entertaining this view, but in one instance is exhibited in the decisions of a single state. The Supreme Court of Texas, in the course of its adjudications upon this subject, has held both the affirmative and the negative of all the propositions above enumerated. Numerous other conflicts exist among the decisions of that court, notably the affirmance and the denial of the rule that the sendee, before he can recover, must identify himself with the contract of transmission. The Tennessee and Alabama cases are not authority in favor of the plaintiff's position, because they refuse to recognize mental pain as an element of damage. They hold it to be an incident, merely, to be taken into consideration in addition to pecuniary loss. There is a decided weight of authority against the right of the plaintiff in error to recover for mental suffering."

In dealing with the question presented we have no reference to dead bodies or the skeletons thereof which have been by law properly appropriated for the benefit of science; as, for instance, for medical schools, and other institutions of learning. That such are property we do not deny, because they have an intrinsic value for a particular purpose; nor do the authorities cited have reference to such cases. They deal with cases where the remains were either intended for burial, or where they were disturbed after having been consigned to the grave. The position in which the courts declare the right by reason of the quasi property interest of the relative in them is the only one which can be supported by any degree of logic; but those courts fail to recognize that the dead body of a near relative, neither by the natural law of mankind, by the common law of England,

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nor by the statutory law of most of the states, may not be sold for personal gain or disposed of in any manner except to bury it decently and respectfully. It is intrusted to his care for that one particular purpose, and, should he violate the duty imposed by law, he may be punished as for crime. As has been correctly said: "A dead body belongs to no one, and is therefore under the protection of the public." The case of *Foley v. Phelps* (Sup.) 37 N. Y. Supp. 471, holds that one may recover for the mutilation of a dead body, not on the ground that there is a quasi property interest therein, but because such an act is a violation of the legal right of the relative to have the body in the condition in which it was when life left it, and that there is a remedy at law for the interference of every legal right; and the opinion conveys the idea that damages may be recovered for such invasion. We cannot concur with these views. That equity will aid one in the enjoyment of every legal right, by injunction or by some other remedy known to that branch of the law, if the party has no adequate legal remedy, we frankly concede; but we strenuously contend that there are legal rights for the violation of which one cannot recover in damages. It requires but brief reflection to conceive of many such cases. There is no difference in principle between a recovery of a parent for mental pain and suffering, caused by the death of a child from personal injury, and a recovery for such pain and suffering as a result of the mutilation of its body after death. Such right, in the first class of cases, except where authorized by statute, has been denied by the current weight of authorities. *Lazelle v. Town of Newfane* (Vt.) 41 Atl. 511; *Oakes v. Maine Cent. Ry. Co.* (Me.) 49 Atl. 418; *Knoxville, C. G. & L. R. Co. v. Wyrick* (Tenn. Sup.) 42 S. W. 434; *Railroad Co. v. Butler*, 57 Pa. 335-338; *Barth v. Kansas City El. Ry. Co.* (Mo.) 44 S. W. 778. In fact, if not authorized by statute, there is no right in the personal representative to recover for personal injury after the death of the injured. But by legislative enactment the compensation allowed for the wrongful or negligent killing of a child is an amount which will compensate for the actual loss of its services and the expenses made necessary by the injury. In addition to this, exemplary damages may be allowed in certain circumstances, but such damages are intended as a punishment for the wrong done, and not for injury to the feelings of the parent. St. Okl. 1893, § 2617.

The courts have always been quick to grant relief, not only for the protection of the dead, but also for the protection of the rights of the living in relation thereto. In one state, mandamus was issued to compel the surrender of a dead body; in others, injunction has furnished the needed remedy. Not because of the interference with the property of another; it was because a right both natural and legal had been invaded; and, as we have already said, equity will always aid one in the enjoyment of a legal right, even though no property interests are involved.

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Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667. In the case of *Griffith v. Charlotte, Columbia & Augusta Railroad Company*, 23 S. C. 25, 55 Am. Rep. 1, the court said: "An administrator cannot maintain an action for the negligent or willful mutilation of the dead body of the intestate, but he may sue for injury to the wearing apparel"—citing from *Blackstone*, vol. 2, p. 429, wherein he says: "Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes," and from *Bishop's Criminal Law*, § 792: "There can be no property in a person deceased; consequently, larceny cannot be committed of his body, but it can be of the clothes found upon the body, or of the shroud." The same rule is stated in 13 Cyc. p. 280: "Since at common law there can be no such thing as property in human remains, no action for civil damages will lie for an injury to a dead body"—citing authorities, both English and American.

Where a corpse is mutilated before or after burial, in such a way as to render necessary the expenditure of extra money or labor in caring for it, or where injury is done to the coffin or clothes, the actual damages sustained may be recovered, and this rule was applied in the case at bar; but, after carefully considering all of the authorities at our command, we are firmly convinced that no recovery can be had for mental pain and anguish caused by the negligent mutilation of such body. Nor are we inclined to criticise, as some other courts have done, the failure of the lawmaking power to provide for recovery in such a case. The Legislature are the judges of the expediency of such a law, and on that question minds might differ, for the legal wrong, as we have observed, is against the public, and not against the individual. The perpetrator of such a crime against public decency should not escape severe punishment, as we should tenderly care for the dead.

We, in a measure, appreciate the feelings of the appellants over the misfortune which occurred, but we have taken the law as it is, and arrived at the conclusions expressed from a consideration of the legal principles and authorities bearing upon the issue involved; and we are satisfied that the judgment of the lower court should be affirmed at the cost of appellants. It is so ordered. All the justices concurring, except BEAUCHAMP, J., who presided at the trial below, not sitting, and HAINER and PANCOAST, JJ., dissenting.

BROWN v. OREGON R. & NAVIGATION CO.

(Supreme Court of Washington, Feb. 26, 1906.)

[84 Pac. Rep. 400.]

Negligence—Contributory Negligence—Necessity of Plea.*—The want of a plea of contributory negligence does not preclude the court from awarding a nonsuit, where plaintiff's evidence so conclusively shows contributory negligence that the court would grant a new trial in case of a verdict in favor of plaintiff.

Railroads—Fires—Action—Instructions.†—Where, in an action against a railroad for damages from fire communicated to plaintiff's barn from defendant's right of way, it appeared that for a day or two before the burning of the barn plaintiff knew of the fire on the right of way, and that he had left a door of his barn open toward the fire, it was proper for the court to instruct that the jury might find plaintiff precluded from recovery by contributory negligence, though there was no plea thereof.

*For the authorities in this series on the question whether it is necessary to plead contributory negligence, see *Engelking v. Kansas City, Ft. S. & M. R. Co.* (Mo.), 17 R. R. R. 800, 40 Am. & Eng. R. Cas., N. S., 800 (defendant could take advantage of contributory negligence appearing from plaintiff's evidence, although pleas of contributory negligence had been stricken out); *Orient Ins. Co. v. Northern Pac. Ry. Co.* (Mont.), 16 R. R. R. 207, 39 Am. & Eng. R. Cas., N. S., 207 (must be pleaded although denied in complaint); *Louisville & N. R. Co. v. Paynter's Adm'x* (Ky.), 14 R. R. R. 140, 37 Am. & Eng. R. Cas., N. S., 140; *Mobile, etc., R. Co. v. Bromberg* (Ala.), 14 R. R. R. 823, 37 Am. & Eng. R. Cas., N. S., 823 (plea that negligence of plaintiff's intestate proximately caused his injuries is insufficient); *Chaney v. Louisiana & M. R. R. Co.* (Mo.), 8 R. R. R. 333, 31 Am. & Eng. R. Cas., N. S., 333 (direction of verdict because of contributory negligence of passenger, not pleaded but, appearing from his own evidence); *Cogdell v. Wilmington & W. R. Co.* (N. Car.), 8 R. R. R. 487, 31 Am. & Eng. R. Cas., N. S., 487 (averments that plaintiff's intestate's death was not caused by defendant's negligence, but by his own negligence, is not sufficient to raise the defense of contributory negligence); *Scott v. Seaboard Air Line Ry. Co.* (S. Car.), 9 R. R. R. 148, 32 Am. & Eng. R. Cas., N. S., 148 (general averment of insufficiency); *Alabama G. S. R. Co. v. Brooks* (Ala.), 6 R. R. R. 375, 29 Am. & Eng. R. Cas., N. S., 375 (insufficiency of plea of obvious danger); *International & G. N. R. Co. v. Locke* (Tex.), 2 R. R. R. 754, 25 Am. & Eng. R. Cas., N. S., 754 (instruction based on facts not pleaded as contributory negligence was properly refused; note, 14 Am. & Eng. R. Cas., N. S., 289 (nonsuit where contributory negligence appears in declaration); *Illinois C. R. Co. v. Davis* (Tenn.), 18 Am. & Eng. R. Cas., N. S., 708 (contributory negligence must be pleaded); *Hughes v. Chicago & A. R. Co.* (Mo.), 2 Am. & Eng. R. Cas., N. S., 284 (must be set up in defense); *Alabama, G. S. R. Co. v. Burgess* (Ala.), 10 Am. & Eng. R. Cas., N. S., 835; *Alabama, etc., R. Co. v. Roach* (Ala.), 5 Am. & Eng. R. Cas., N. S., 705; *Johnson v. Louisville & N. R. Co.* (Ala.), 2 Am. & Eng. R. Cas., N. S., 300 (plea was too general); *Smith v. Southern Ry. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 777 (defense of contributory negligence must be pleaded by answer, and cannot be raised by demurrer); *Woodward Iron Co. v. Andrews* (Ala.), 8 Am. & Eng. R. Cas., N. S., 755; *Chicago, B. & Q. R. Co. v. Oyster* (Neb.), 12 Am. & Eng. R. Cas., N. S., 655 (sufficiency of general allegation).

†For the authorities in this series on the subject of contributory negligence of owners of property set on fire by sparks from locomotives, see foot-notes appended to *St. Louis & S. F. R. Co. v. League* (Kan.), 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772.

Brown v. Oregon R. & N. Co

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by David Brown against the Oregon Railroad & Navigation Company. Judgment in favor of defendant, and it appeals from an order granting a new trial. Reversed.

W. W. Cotton, Arthur C. Spencer, and Samuel R. Stern, for appellant.

W. C. Jones, for respondent.

DUNBAR, J. This is an action to recover for damages alleged to have been occasioned to respondent's property by fire claimed to have been set on the right of way of the appellant, opposite to the barn of respondent, in Kootenai county, Idaho. The right of way was on one side of the Coeur d'Alene river and the barn on the other; the barn being a few feet from the banks of the river and the right of way close to the banks of the river, the river being, as we are able to gather from the testimony, from 150 to 200 feet wide. The complaint alleged the negligence of the defendant in burning its right of way without taking care of its fire, and the damage to the plaintiff by reason of the barn being burned by sparks blowing from the fire to the barn. Upon the trial of the cause, verdict was rendered for the defendant. At least, we presume such a verdict was rendered. It does not appear in the record, but both appellant and respondent having argued the case on that theory, we have assumed that the verdict was as is alleged. A motion for retrial was granted, upon the ground, as stated by the court, of error in instructing in relation to the negligence of the respondent, and upon no other ground. This appears by a supplemental statement incorporated in the record.

The instruction was as follows: "I instruct you further that if the plaintiff knew of the existence of the fire on the land opposite the barn adjoining along the right of way before the same was communicated to his barn, and if in the exercise of ordinary care he had reason to believe that there was danger of its being communicated to his barn, then it is his duty to use ordinary care to prevent the fire from being communicated to his barn; that it is his duty to either put the fire out himself or to communicate with the defendant or its employees, if he could. It was in the way of ordinary care, and if he failed to use ordinary care for the protection of his own property against destruction by fire, then the plaintiff cannot recover."

It is contended by the respondent that there is no question of contributory negligence in this case, and that there was no duty devolving upon the respondent in the premises, and that, therefore, the instruction had no proper place in the case, and should not have been given. The appellant cites cases from a great many different jurisdictions, to the effect, that, notwithstanding the fact that in jurisdictions where contributory negligence is an affirmative defense, as in this state, it is proper to

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submit to the jury the question whether or not the respondent exercised ordinary care in protecting his own property, even though no plea of contributory negligence has been set up by the defendant in its answer. These authorities, it is claimed by the respondent, are not in point. But we are forced to the conclusion that they are directly in point—a great many of them; and without reviewing them generally, that the rule is as stated in *Bunnell v. Rio Grande, etc., Ry. Co.* (Utah) 44 Pac. 927, where the court says: "Generally, contributory negligence is a matter of defense, and must be alleged and proven by the defendant; but where the testimony on the part of the plaintiff, who seeks to recover damages for injuries resulting from negligence, shows conclusively that his own negligence or want of ordinary care was the proximate cause of the injury, he will not be permitted to recover, even though the answer contains no averment of contributory negligence." And it is the general rule that the want of a plea of contributory negligence will not preclude the trial court from awarding nonsuit, when the evidence introduced by the plaintiff establishes a defense so conclusive in this respect that the court will grant a new trial in case of a verdict in his favor upon like evidence.

If this be true, then we see no inconsistency in the court submitting to the jury questions of fact which, if established as facts, would preclude the plaintiff from recovering. This was all that was done in this case. There was testimony on the part of the plaintiff to the effect that he had known for a day or two of this fire raging on the right of way opposite his barn; especially knew of it that morning; and that he had left open a door 14 feet wide which looked toward the fire; and, while the court in this case did not go so far as to say that these would be such acts and omissions on the part of the plaintiff as would prevent him from recovering, it left it to the jury to determine whether such acts in their judgment showed the lack of the exercise of ordinary care.

We are unable to discover any error in the instruction, and the judgment will therefore be reversed, with instructions to the trial court to deny the motion for a new trial, and enter judgment on the verdict.

MOUNT, C. J., and HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

STACEY *v.* HAVERHILL, G. & D. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Essex, April 3, 1906.)

[77 N. E. Rep. 714.]

Street Railroads—Operation—Injuries to Horse and Vehicle—Contributory Negligence of Owner.—Where, the owner of a horse and vehicle left them on a street beside a street railway unfastened in any way when he knew a car was about due and remained in a house where he did not see them for about 10 minutes, he was guilty of negligence barring a right to recover for injuries to them.

Exceptions from Superior Court, Essex County; Chas. A. DeCourcy, Judge.

Action by Henry L. Stacey against the Haverhill, Georgetown & Danvers Street Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

John J. Ryan, for plaintiff.

Chas. H. Poor and *Edmund B. Fuller*, for defendant.

LATHROP, J. If we assume in favor of the plaintiff that there was some evidence of negligence on the part of the defendant's motorman in not stopping the car sooner than he did, we are of opinion that the plaintiff did not sustain the burden of proof, which was upon him, of showing that he himself was in the exercise of due care, in leaving the horse unfastened in any way for 10 minutes by the side of a street, when he knew that a car was about due. The plaintiff sometimes used a weight, and it is evident that if one had been used in this case the accident might not have happened. While there was evidence that the horse was kind, easily managed, and not afraid of cars, yet the accident was caused not by the horse being frightened, but by his wandering across the street and the track of the defendant, and grazing upon some trees, leaving the wagon upon the track. During the 10 minutes while the plaintiff was absent, he remained in a house, during which time he did nothing with reference to the horse, nor did he see the horse. The case differs from *Southworth v. Old Colony & Newport Railway*, 105 Mass. 342, 7 Am. Rep. 528, upon which the plaintiff chiefly relies. In that case the driver was not accustomed to hitch his horse, and was absent only four or five minutes. The street where he left the horse was not one where cars were passing. The railroad crossing was on another street, and from 50 to 100 rods distant from the place where the horse was left. We do not intend to decide that momentarily leaving a horse unhitched upon a street, is negligence as a matter of law; but we are of opinion that under the circumstances of the case before us, the instruction requested should have been given.

Exceptions sustained.

KELLER v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania, Feb. 26, 1906.)

[63 Atl. Rep. 413.]

Railroads—Injury to Person on Track—Trespasser.—A pedestrian on a public street does not become a trespasser merely because the city has granted to a railroad company the privilege of temporarily laying a track thereon for its convenience.

Same—Negligence—Evidence.—In an action by a boy against a railroad company for personal injuries received while walking near the track of a railroad temporarily laid on a street, held, that there is no evidence to show negligence on the part of defendant.

Same—Duty to Signal.—There is no imperative duty resting on a railroad company, running its trains over tracks on a public street, to continuously give danger signals.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles Keller and Edwin Keller, by his father and next friend, Charles Keller, against the Philadelphia & Reading Railway Company. Verdict for Charles Keller for \$2,500 and for Edwin Keller for \$18,000. Judgment for defendant notwithstanding the verdict, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

A. S. L. Shields, for appellants,
Gavin W. Hart, for appellee.

ELKIN, J. We cannot accept as sound the contention of appellee that the injured boy was a trespasser. Hamilton street is a public highway, the use of which could be enjoyed by pedestrians, drivers of teams, and the defendant company, each having due regard for the rights and privileges of others. Neither appellant nor appellee, nor any one else, could make use of the street in disregard of the rights of others lawfully on the same. When the boy stepped from the pavement on the street in the middle of the square his risks were increased, and in the case of an adult person it would be his duty to exercise greater care. It would be a harsh rule to hold that a pedestrian on a street, where he ordinarily had a right to be, should become a trespasser because the city had granted a railroad company the privilege of temporarily laying a track thereon for its convenience and benefit. The temporary construction and use of the track in the center of the street by appellee did not change the general purposes for which the street was intended, nor did it deprive appellant of his right to use the same. The cases cited holding children to be trespassers are not applicable to the facts of the present case. The negligence alleged in this case is that the train was running at an unusually high rate of speed without giving proper danger signals. The evidence in support of these allegations is meager, indefinite, and inconclusive. One witness estimated the rate of speed to be 10 or 12 miles an hour.

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Another testified "it was going less than eight miles an hour" and "might have been going only six, four, or five," while others did not fix any rate. The evidence did not show what was the usual rate of speed at this point, nor do we think such facts were established as to permit a jury to draw the inference that the rate was unusual. The case, however, does not depend upon a determination of the question whether the train was running at an unusual rate of speed. It was the duty of appellee to exercise proper care no matter whether the train was running 5, 6, 8, or 10 miles an hour.

This brings us to a consideration of the controlling question raised by this appeal. Did appellee do anything it should not have done, or did it fail to do anything it should have done in the performance of its duty to appellant? No negligence of commission is charged, but it is contended that appellee failed to give warning by ringing a bell or blowing a whistle and the omission of these duties shows want of care. Failure to perform these alleged duties under the circumstances was not negligence per se. The appellee was under no imperative duty to continuously give danger signals while running its train over the track on the street. It was the duty of the engineer to look ahead and if he saw drivers of vehicles or pedestrians in a place of danger, to give them warning of the approaching train by proper signals. There is no evidence to show that the engineer was or was not looking ahead. In the absence of evidence, the presumption of law is that he was doing his duty. We must then proceed on the assumption that the engineer was looking ahead and performing his duty in this respect. If he was looking ahead, as he is presumed to have been, could or should he have seen the boy in time to give danger signals and avoid the accident? If he could it was his duty to do so, and failure to perform such duty is negligence, and appellee would be liable in damages for injuries caused thereby. The train was running west in the same direction the boy was walking. The boy had been walking on the sidewalk, but near the middle of the square he left the pavement and stepped on the street, thus placing himself nearer to the moving train. He walked along the street about nine feet before he was struck. There is no evidence that the engineer saw him, either on the pavement or the street, but even if it be conceded that he did see or should have seen the boy while walking on the pavement or at the time he stepped on the street, we cannot say that he failed in the performance of any duty he owed him. The engineer was not bound to take notice that the boy might suddenly leave the sidewalk or street where he was safe and run into a place of danger. When he stepped from the pavement on the planked street to continue his journey he had four and one-half feet to walk on between the curb and the first rail of defendant's track, so that even allowing for the overhang of the freight cars he had a safe place on the street to walk alongside of the train. If the engineer saw him while he was walking at a safe place on the pavement or

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street, and of this there is no evidence, he was not required to act on the assumption that the boy would step in front of or into a moving train. As has been said, the testimony does not show that the engineer saw him or should have seen him in time to avoid the accident. The boy says the engine and tender had passed him safely and he was struck by a box car in the train. Just how far the engine was away from him at the time he stepped on the street does not appear. It did appear that the boy walked nine feet on the street after he stepped from the pavement. It also appeared that the engine and tender had safely passed him before he was struck by the box car. The reasonable inference from these facts is that the boy stepped on the street just about the time the head of the engine came near that point. He would then be in a position similar to that of a child who suddenly runs into the side or in front of a moving car. It has been uniformly held in such cases that there can be no recovery. *Philadelphia & Reading R. R. Co. v. Spearen*, 47 Pa. 300, 86 Am. Dec. 544; *Kline v. Traction Co.*, 181 Pa. 276, 37 Atl. 522; *Callary v. Transit Co.*, 185 Pa. 176, 39 Atl. 813; *Miller v. Union Traction Co.*, 198 Pa. 639, 48 Atl. 864; *Sontgen v. Railway Company*, 213 Pa. 114, 62 Atl. 523. The appellants have failed to show any negligence of appellee such as to make it liable in damages for the injuries complained of.

Judgment affirmed.

STANDEN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, Feb. 26, 1906.)

[63 Atl. Rep. 467.]

Appeal—Review—Instructions—Failure to Instruct.—Where the evidence in an action for personal injuries is conflicting, defendant cannot complain of a lack of instruction as to the weight of testimony of interested and disinterested witnesses, where he did not make a request therefor.

Husband and Wife—Injuries to Wife—Damages.*—In an action by a husband and wife to recover for injuries to the wife, the husband can show the value of the wife's services in his business as florist, as an element of damage to him.

Same—Earnings of Wife—Rights of Husband.—Act June 8, 1893 (P. L. 344), vesting in a married woman all earnings acquired by her in carrying on any separate business, does not deprive the husband of his common-law right to the earnings or services of his wife rendered by her in and about their domestic affairs or his business, and, in the absence of an agreement to the contrary, such earnings belong to the husband.

*For the authorities in this series on the subject of the elements of damages recoverable by husband or wife for death or injuries to the other, see foot-note appended to *Birmingham Southern R. Co. v. Lintner* (Ala.), 16 R. R. R. 225, 39 Am. & Eng. R. Cas., N. S., 225; foot-notes appended to *Denver & R. G. R. Co. v. Gunning* (Colo.), 15 R. R. R. 842, 38 Am. & Eng. R. Cas., N. S., 842.

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Appeal from Court of Common Pleas, Philadelphia County.

Action by Henry G. Standen and Ruth Standen against the Pennsylvania Railroad Company. Verdicts for plaintiffs. Verdict for Ruth Standen was paid, and from judgment in favor of Henry G. Standen, defendant appeals. Affirmed.

At the trial, the plaintiff offered evidence which tended to show that on August 3, 1901, she was injured at the Haverford station of the defendant by a sudden jolt and start of the train when she was attempting to alight. Mrs. Standen lived with her husband at Haverford in a house connected with greenhouses in which her husband conducted a florist business. The evidence showed that the plaintiff Mrs. Standen assisted her husband in this business. When Henry G. Standen was on the stand, he was asked this question: "Q. To what extent was your wife able to be of assistance or of service to you? Mr. Barnes: I ask for an offer what they propose to prove. Mr. Porter: We offer to prove by this part of the testimony and by this witness on the stand that his wife, previous to the accident, was of service to him, or to what extent she was an aid, comfort, and of assistance to him. Mr. Wiler: Q. Now, Mr. Standen, to what extent was your wife able to be of assistance or of service to you? A. She would do her own household duties—do her own washing and ironing—and while I was not working she would attend to the greenhouse; yes, and pot plants and hybridize seed and propagate and make cuttings, and from the knowledge I obtained during my seven years' service in the royal nurseries in England— Mr. Barnes: I now object to the immediately preceding part and as to what the witness is about to say; and I move that so much of the answer be stricken out as applies to the duration of the work by the wife in their combined business. (Objection overruled, and motion refused. Exception for defendant.) Mr. Barnes: Q. Now, there is included in this sum of money which you have named an extra man or men? A. Extra man. Q. Man? A. Yes. Q. \$1,676.66? A. Yes; that is wages I paid to the extra man taking Mrs. Standen's place in the greenhouse. Mr. Barnes: If the court please, I ask that that item be deducted, be stricken out; that is the same question. The Court: I will overrule the objection and give you an exception; that raises the question fairly and squarely. (Exception for the defendant.)"

Defendant presented these points: "(5) If the jury should find a verdict for the plaintiff Henry Standen it cannot, under the evidence in this case, award any damages to him for loss of services of his wife, because of the fact that prior to the accident she took part in the business of florist carried on by him, and that since the accident she had not been able to assist him in the business. (6) If the jury find a verdict for the plaintiff, Henry Standen, it cannot award to him as damages any amount which he was required to pay as wages to additional or extra men employed by him to do the work in his florist business formerly done by his wife. Answer: Of course, gentlemen, you have got

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to treat that matter, if you come to find a verdict for the plaintiff, in a reasonable way. This man says his wife did his washing, ironing, looked after all the children (and I think she had five of them), and in addition to that helped him in the florist business—potted and so on. Now, I don't know what the experience of most men is, but my experience would teach me that a woman who did the washing, ironing, cooking, and attended to five children would not have very much time to look after the florist business in addition to that. Hence, when a man says, 'I want you to pay me for a housekeeper to do the housework my wife used to do, and I want you to pay me for a man in the greenhouse,' it is manifest she did not work six days a week at home and six days a week in the greenhouse; she could not be in two places at the same time. Hence it would hardly be fair to charge the defendant for a man and a housekeeper both."

The court charged, in part, as follows:

"Now, I will pass to the question of whether there is liability. I said yesterday when Judge Porter was arguing the case, and I say it now, in order that it may go down upon the minutes, that in my judgment the plaintiffs' case practically rests upon the uncorroborated testimony of Mrs. Standen. Let me read her testimony. It has been read to you this morning, but I want to read it in conjunction with the testimony of Mr. Gallagher. Now, this lady was asked, 'Tell us what occurred when the train arrived at Haverford.' She is the woman who was hurt; she is the woman who is suing here for damages, and it was her duty, of course, to tell all that occurred as far as she could. She starts, not where one would imagine a person would start, with a statement of how she arose, when she arose, but she says, 'I was getting off the car, the car next to the last car, at the rear end of the car, when the train started with a jolt, and threw me back on the steps.' There is no statement there of how far down the steps she had gotten. Unless she was part way down the steps the jolt would not have thrown her back on the steps; it would have thrown her back on the platform. Yet it may be that she meant by 'steps' to include the whole thing outside of the doorway. [Continuing reading.] 'I don't remember nothing after that until a gentleman picked me up—was assisting me and giving me my caba and a small package I had with me.' She does not give the gentleman's name, and if I have read her testimony accurately, she does not mention the fact that Mr. Gallagher mentioned here, that he gave her a card. If I am incorrect as to that, counsel will call my attention to it. She says, with regard to getting up, 'I sat in my seat until the train came to a full stop; I did not loiter; I used the same speed in getting off the car as I generally used.' Now, Mr. Gallagher says that he got off the train, and, looking around, discovered that he was at the wrong station. 'And I turned around towards the car again, and, seeing the mistake, I turned around to the car to go, and I saw the cars give a jolt, and I just had a glance of a woman falling from the car; and I turned around, and I saw it was a

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woman; and I turned around and picked her up, and carried, helped her over to one of the benches; and I went back again and I picked up her parcel and her bag, and placed it alongside of her; and I asked her if she was hurt, and she told me she did not know quite yet whether she was hurt or not. I said—after a few minutes, I said again, “You could go home?” and she said, “I think I can,” and so I went then to Bryn Mawr.’ He spoke of a crush or a jolt, and in answer to the question, ‘Describe what the crush was,’ he said, ‘The starting up of the car, and moving it from the top they gave a jolt to go.’ [Continuing reading.] Q. Then what did you see? A. I saw a shadow in the back of me, and I turned around quick and see it was a woman, turned back here. Q. Did the car go on then? A. Yes. Q. That was the train starting on its forward course? A. Yes.’

“Now, on the part of the defendant, evidence is presented to show—and it is for you to give the weight that you think proper to it—to show that that train in its due course stopped at Haverford station; that it was a local, stopping at every station between Paoli and Philadelphia; prior to reaching Haverford, announcement was made that the next stop would be Haverford; when the train reached Haverford announcement was made that that stop was Haverford; that the train stopped to let off a number of people; that it was the occasion of a half holiday, in August; and that it was a main line train, a local. Mr. Kincaid, Mrs. Baird, and perhaps others—I do not recall whether others testified to that or not—testified, not all to one complete story, but the story, as taken from the testimony of the defendant’s witnesses, if you believe that they are referring to the Standen incident, is that Mrs. Standen was in the car; the car was there until everybody that wanted to get off got off; that the car then started; that after it started Mrs. Standen stepped from the steps of the car onto the platform and did not fall. If she stepped off of that car after it had moved half a car length, or a car length, and took several quick steps upon the platform, you can determine better than I, or as well as I can, what would be the effect of that upon a woman. A woman is more delicately constructed than a man, and I think a little less properly constructed for stepping off of a moving car than a man, and yet men have been hurt by doing it. Would that account for the injury she now has? Would that account, for instance, for two broken ribs? Counsel for the plaintiffs contend that the two broken ribs practically show that the woman must have received some injury at that time other than that which possibly could have come to her by stepping from the steps of a car. That strikes me as a fair argument; and yet on the other side it is argued that there is no testimony with regard to broken ribs except the testimony of the attending physician. There is no evidence at all from the woman herself that she had any fractured ribs, nor is there anything to indicate exactly what the doctor means by the technical term ‘fracture.’ ‘Fracture’ is a break. A rib may be broken without being broken off—that is to say, it may be

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fractured, as I understand, without being broken off; but, at any rate, that is a matter for you to consider. That has been fairly argued on both sides, and it is for you to consider. It has, to my mind, considerable bearing upon the question of whether these people are referring to Mrs. Standen or not."

Verdict for Henry G. Standen for \$10,000, and for Ruth Standen for \$5,000. The verdict for Ruth Standen was paid.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John Hampton Barnes, for appellant.

William W. Porter and Wiler & Elliot, for appellee.

MESTREZAT, J. We cannot agree with the defendant company, the appellant, that the court's charge imposed on it the burden of explaining to the jury the manner in which the injuries to Mrs. Standen were received. What was said by the court interrogatively on the subject in that part of the charge was simply for the purpose of directing the attention of the jury to the appellee's contention that, as Mrs. Standen's ribs were broken on the occasion of the accident, she was thrown off the steps of the car, and did not step off while the car was in motion, as claimed by the appellant. The learned judge did not tell the jury that her ribs were broken on the occasion, but suggested in his charge a doubt of the truth of the allegation in language from which it could be inferred he did not believe they were broken at that time. In that connection the court said: "Counsel for the plaintiffs contend that the two broken ribs practically showed that the woman must have received some injury at that time other than that which could possibly come to her by stepping from the steps of the car. That strikes me as fair argument; and yet on the other side it is argued that there is no testimony with regard to broken ribs except the testimony of the attending physician." The learned judge then suggests to the jury that the woman does not say she had fractured ribs, and that the testimony of the attending physician on the subject is indefinite. The appellant denied what the appellee alleged, that the woman's ribs were broken on the occasion when she alighted from the train. There was, however, sufficient evidence to go to the jury on that question, and if they determined it in the affirmative, the appellee's argument, as the court suggests, was plausible, that merely stepping from the car step would not cause the fracture of the ribs, but that, as the appellee claims, the woman must have been thrown from the car steps by the sudden jolting and jerking of the car. It was a serious dispute at the trial whether the testimony of some of the appellant's witnesses referred to Mrs. Standen and the occasion when she alleges she was injured or to another woman and to another occasion; and the learned judge in this part of the charge suggests that the incident of the broken ribs might have considerable bearing on that question. The fifth assignment is not sustained.

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Where there are several disinterested witnesses whose testimony contradicts the testimony of a party himself or of any interested witness in his behalf, the trial judge should direct the attention of the jury to the fact and point out the value and weight of the testimony of the interested witness in comparison with that of the disinterested witnesses. But we do not think that rule will, under the circumstances of this case, convict the court below of error. It was, as suggested above, an open question from their own testimony whether most of appellant's witnesses who described an accident they had seen at Haverford station referred to Mrs. Standen and the accident when she attempted to alight from the train and was injured. But if she was the woman, and it was the same occasion, there was practically but one disinterested witness on each side who testified to the manner in which Mrs. Standen was injured. Gallagher, called by the appellee, was, so far as the evidence discloses, wholly disinterested, and, notwithstanding the contention of the appellant company and the suggestion of the trial judge, we think he substantially corroborates the story of the accident as told on the witness stand by Mrs. Standen. He saw "the cars give a jolt" and the woman fall from the car, and says "this starting up of the car and moving it from the top they gave a jolt together. * * * That was the train starting on its forward course." All the witnesses called for the appellant to testify to the happening of the accident were more or less interested, except Mrs. Baird. Conceding her testimony to be in conflict with that of Mrs. Standen as to the manner in which the latter attempted to alight from the train, it is met, as we have suggested, by the testimony of Gallagher, who is clearly disinterested in the result of the controversy. Under these circumstances, if the defendant's counsel deemed it important that the court should explain to the jury the relative value and weight of the testimony of interested and disinterested witnesses, he should have directed the attention of the court to the matter by presenting a point, or called attention to it orally at the conclusion of the charge. The learned counsel for appellant, after the testimony had already been submitted and he knew the witnesses and their testimony, presented to the court several requests for instructions, and if he thought it of any importance to his client that the jury should be instructed as to the relative value and weight of the testimony, he should have prayed such instructions by a proper point, and they would have been given. Having had this opportunity on the present trial and, as the record discloses, there having been a former trial of the cause, with possibly the same witnesses, resulting in a much larger verdict for each of the plaintiffs, the defendant's duty required it to pray for special instructions on the subject and not await the chance of favorable action by the jury and, being disappointed, ask this court to direct a new trial.

Another question in the case is as to the measure of damages. This was a joint action, brought under the act of May 8, 1895

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(P. L. 54), by Henry G. Standen and his wife to recover damages for the injuries she sustained by reason of the alleged negligence of the appellant company. The trial resulted in a verdict and judgment for each of the plaintiffs. The appellant company paid the wife's judgment, but took this appeal from the judgment entered in favor of the husband. For more than 40 years, Henry G. Standen has been engaged in and has conducted the business of a florist. The greenhouses are connected with his home at Haverford. It appeared by evidence on the trial that the wife performed her household or domestic duties, and in addition thereto assisted her husband in his business as a florist. He testified: "She would do her own household duties, do her own washing and ironing, and while I was not working she would attend to the greenhouses; yes, and pot plants, and hybridize seed, and propagate and make cuttings." He also testified that he had to employ a man to take the place, and to perform the services, of Mrs. Standen in his greenhouses and about his business. The husband was permitted, against the objection of the defendant, to recover for the loss of the value of his wife's services to him in his business as a florist. This is assigned for error. The appellant contends, as stated in his printed brief, "that the only services for which a husband is entitled to recover are those which he has a right to expect and demand of the wife as a wife—that is, for the loss of her services in her domestic duties, the care of himself, his household, and his children, and not for the loss of services in the conduct of his business."

At common law the husband, during the existence of the marital relations, was entitled to the services and earnings of his wife. It was held by this court that at common law the husband was entitled to the person and labor of his wife and the benefits of her industry and economy. *Raybold v. Raybold*, 20 Pa. 308. He also had a right to the joint earnings of himself and wife in his business. *Bucher v. Ream*, 68 Pa. 421. If she engaged in service outside the family he was entitled to her earnings. *Hackman v. Flory*, 16 Pa. 196. If his wife was injured by the negligence of another and her earning power was thereby diminished, the negligent party was responsible to the husband for the loss. It was conceded by the appellant company that such were the common-law rights of the husband to his wife's services and earnings, but it is claimed that, under the present legislation in this state, a married woman is entitled to her earnings while engaged in her husband's business and, to that extent, the common-law rule is abrogated. But this contention is based on an erroneous interpretation of the present, as well as of the past, legislation affecting the rights of married women. That legislation vests in a married woman all earnings acquired by her in carrying on any separate or independent business or in performing any labor or services on her sole and separate account. This changed the common-law rule and takes such earnings from the husband and gives them to the wife absolutely. The

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legislation, however, does not affect or change the rule as to the earnings of the wife acquired in her capacity as wife for services rendered about her household duties or when assisting her husband in his business. In the absence of an agreement to the contrary, such earnings continue to belong to the husband, and neither his wife nor her creditors can assert a right to them by an action at law or otherwise. It is only when she engages at labor or in business in her own right, and not as wife, that the statute declares that the accumulations or earnings from that labor or business shall be her property and belong to her and not to her husband or his creditors. It was not the intention of the legislation to deprive the husband of his common-law right to the earnings or services of his wife, rendered as wife, by her in and about either their domestic matters or his business affairs. For such services, she has no legal recourse against him or his estate. Such has been the interpretation placed upon the act of June 3, 1887 (P. L. 332), and also on its substitute, the present law, the act of June 8, 1893, (P. L. 344, 2 *Purd.* 1299); *Readdy v. Shamokin Borough*, 137 Pa. 98, 20 *Atl.* 396; *Henry v. Klopfer*, 147 Pa. 178, 23 *Atl.* 337; *Baker v. North East Borough*, 151 Pa. 234, 24 *Atl.* 1079; *Kelley v. Mayberry Twp.*, 154 Pa. 440, 26 *Atl.* 595; *Nuding v. Urich*, 169 Pa. 289, 32 *Atl.* 409; *Platz v. McKean Twp.*, 178 Pa. 601, 36 *Atl.* 136; *Endlich & Richards on Married Women*, § 264. A like construction has been given similar statutes in other states. *Blaechinska v. Howard Mission, etc.*, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215; *Cregin v. Railroad Co.*, 18 Hun. (N. Y.) 368; *Ry. Co. v. Twiname*, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352. As the earnings of the wife for services performed in the business of her husband belong to the latter, any deprivation of those earnings or any diminution or loss of her capacity to assist her husband in his business caused by the negligent act of the appellant company was an injury to the husband, for which he was entitled to recover in this action. The value of her services of which he was deprived or the extent of the diminution of her capacity to assist him in his home and business affairs was his loss, and not that of his wife. There was, therefore, no error in the rulings of the learned trial judge in this branch of the case. As suggested by appellant's counsel, the wife received no wages from her husband for her services in assisting him in his business, and on the trial she claimed no damages for the loss of such services. This was because the husband was entitled to her services in the absence of a contract stipulating to the contrary, and in this action he proved their value to him and asked a verdict compensating him for their loss. The learned court affirmed the appellant's seventh point, for the reason, as stated by him, "that I do not understand that the plaintiffs are pressing for any loss of earning power by the plaintiff, Ruth Standen."

Aside from the above reasons, the judgment must be affirmed for the reason that the appellant was not injured by the court's

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ruling that the husband was entitled to the services of his wife in the conduct of his own business. The act of 1895, under which the action was brought, requires, in cases like the present, that the action shall be brought in the name of the husband and wife; that separate verdicts shall be rendered, one determining the right of the wife and the other verdict determining the right of the husband; and that separate judgments shall be entered thereon with the right to separate executions. The rights of both parties for the injuries inflicted on the wife are redressed in one action, and the amount of damages is apportioned between the husband and wife by the separate verdicts. The requirements of the act were observed in this case, and separate verdicts were rendered in favor of the wife and the husband. The appellant company alleges that the court erred in charging that the husband was entitled to recover for the loss of his wife's services, and that, therefore, the verdict of the husband was predicated on an erroneous measure of damages. Conceding that to be true, it is not the appellant who is injured, but the wife, and she is not complaining. She raises no question as to the correctness of the rulings of the court, but has accepted from the appellant the amount of her judgment. The loss of her services was an element of damages to be considered and compensated for in the action, and the damages, therefore, must necessarily be recovered by the husband or the wife. Had the trial court sustained the appellant's contention, the effect would have been to award the damages for loss of her services to the wife instead of the husband. The ruling of the court, however, would not have diminished or affected the aggregate amount of the two verdicts. The appellant company would have the same, and no greater, sum to pay as damages resulting from the wife's injuries. It was, therefore, not injured by the ruling of the trial court on the measure of damages, and hence its appeal is without merit.

The judgment is affirmed.

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(Supreme Court of Indiana, May 18, 1906.)

[77 N. E. Rep. 945.]

Street Railroads—Action for Injuries—Question for Jury.—In an action against a street railroad for injuries to plaintiff in a collision between her vehicle and a car, the question as to plaintiff's contributory negligence in driving on the track held one for the jury.

Same—Burden of Proof.*—In an action against a street railroad for

*For the authorities in this series on the subject of the burden of proving contributory negligence, see foot-notes appended to *Choctaw, O. & G. Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168; *Peoples v. North Carolina R. Co.* (N. Car.), 18 R. R. R. 18, 41 Am. & Eng. R. Cas., N. S., 18.

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injuries to plaintiff in a collision between her vehicle and a car, the burden was on defendant to show contributory negligence.

Same—Contributory Negligence—Driver of Vehicle.†—One driving along a street railroad track in daylight has the right to suppose that, if a car is approaching from the rear, a proper lookout is maintained and that ordinary care will be exercised not to injure him.

Negligence—Trial—Question for Jury.—Where a question as to negligence or contributory negligence is so presented that jurors, as reasonable men, might fairly differ as to the deduction to be drawn, the question is for the jury.

Appeal—Failure to Reserve Exceptions—Admission of Evidence.—The admission of testimony will not be reviewed on appeal where no exception appears to have been reserved to the question by which the testimony was elicited.

Street Railroads—Action for Injuries—Instructions.—In an action against a street railroad for injuries to plaintiff in a collision between her vehicle and a car, the complaint in its preliminary allegations characterized as negligence a running at high speed, and a failure to sound the gong, but the allegation concluded with a charge of negligence in running the car upon and against plaintiff's buggy. Held, that an instruction submitting the doctrine of last clear change was not outside the issues.

Appeal—Records—Questions Presented—Instructions.—Where neither the language nor substance of instructions complained of can be found in the briefs, they will not be reviewed.

Trial—Special Findings—Inconsistency with Verdict.—In order to justify judgment on special findings notwithstanding the general verdict, the answers must make out a case of such antagonism on some vital point as not to be capable of being removed by any evidence admissible under the issues.

Street Railroads—Operation—Persons Near Track—Care Required of Railroad.‡—Where a motorman saw one driving a vehicle in the same direction turn on the track ahead of the car in order to pass a wagon, he was not at liberty to continue to proceed at a high speed without sounding the gong.

†For the authorities in this series on the subject of the care required of those driving vehicles in streets upon which street cars are operated, see foot-notes appended to *Ablard v. Detroit United Ry.* (Mich.), 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722; foot-note appended to *McKee v. Harrisburg Traction Co.* (Pa.), 18 R. R. R. 3, 41 Am. & Eng. R. Cas., N. S., 3; foot-note appended to *McCarthy v. Boston Elev. Ry. Co.* (Mass.), 17 R. R. R. 856, 40 Am. & Eng. R. Cas., N. S., 856; *Marden v. Portsmouth, etc., St. Ry.* (Me.), 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; *Riley v. Shreveport Traction Co.* (La.), 16 R. R. R. 785, 39 Am. & Eng. R. Cas., N. S., 785; foot-note appended to *Wood v. Boston Elev. Ry. Co.* (Mass.), 16 R. R. R. 475, 39 Am. & Eng. R. Cas., N. S., 475.

‡For the authorities in this series on the subject of the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to *Ablard v. Detroit United Ry.* (Mich.), 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722; foot-note appended to *McKee v. Harrisburg Traction Co.* (Pa.), 18 R. R. R. 3, 41 Am. & Eng. R. Cas., N. S., 3; *Marden v. Portsmouth, etc., St. Ry.* (Me.), 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; foot-note appended to *Sharpton v. Augusta & A. Ry. Co.* (S. Car.), 17 R. R. R. 190, 40 Am. & Eng. R. Cas., N. S., 190; *Hollingshead v. Camden & Suburban Ry. Co.* (N. J.), 16 R. R. R. 797, 39 Am. & Eng. R. Cas., N. S., 797; foot-note appended to *Miller v. St. Charles St. R. Co.* (La.), 16 R. R. R. 460, 39 Am. & Eng. R. Cas., N. S., 460; foot-notes appended to *Laronde v. Boston & M. R. R.* (N. H.), 16 R. R. R. 223, 39 Am. & Eng. R. Cas., N. S., 223.

Indianapolis St. Ry. Co. v. Marschke

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Bertha A. Marschke against the Indianapolis Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court under subdivision 2, § 1337j, Burns' Ann. St. 1901. Affirmed.

See 70 N. E. 494.

Winter & Winter, for appellant.

P. B. Bartholomew and *R. F. Stuart*, for appellee.

GILLET, C. J. Action for personal injury. There was a verdict and a judgment for appellee. The principal question in the case is whether the evidence shows that appellee was guilty of contributory negligence. Upon some points there was a sharp conflict in the testimony, but assuming, as we must, that the jury followed the evidence which was most favorable to appellee, the following may be said to be the facts: About 8 a. m. of a morning in August, appellee was driving in a single buggy to the southeast, down one of the approaches of the Virginia avenue viaduct, in the city of Indianapolis. The driveway at that place is 50 feet wide, and there was a street car track on either side of the center of the street. Four lines of cars used these tracks. Virginia avenue, Louisiana street, and New Jersey street intersect on said approach, about a block and a half from the crown of the viaduct. Appellee was driving on the southwest side of the street. Her horse was going at an ordinary trot. She knew that cars frequently passed along said tracks. At a point about 200 feet from said street intersection, she turned toward the track nearest her, for the purpose of passing a heavy wagon that was slowly moving in the direction in which she was going. Appellee knew that the southeast bound electric cars used the said track, and as she turned in that direction she glanced back up the track, and also listened. She did not hear a gong, nor did she hear a car moving on the viaduct. She continued to drive near the southwest rail of said track until she was opposite the wagon, and at about the center of the intersection of said streets, when the running board of appellant's street car which had approached her from the rear, came into contact with the left hind wheel of her buggy, throwing her out and injuring her. The car was running, according to the testimony of some of the witnesses, at the rate of about 20 miles per hour, and there was no gong sounded.

From side to side a city street belongs to the public. *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117. A permission granted by the authorities to an electric railroad company to lay tracks on a public street and operate electric cars along the same, does not amount to an abandonment in favor of the company of the space occupied by the tracks. As the cars cannot turn out, and as their speed is usually greater than that of many other conveyances, they are entitled to the precedence which the ne-

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cessity of the situation requires, but their movements should be regulated with a due regard to the situation of the drivers of other vehicles. *Com. v. Temple*, 14 Gray (Mass.) 69, 78; *Vincent v. Norton, etc.*, Street Railway Co., 180 Mass. 104, 61 N. E. 822; *Benjamin v. Holyoke Street Railway Co.*, 160 Mass. 3, 35 N. E. 35, 39 Am. St. Rep. 446; *Marden v. Portsmouth, etc.*, Street Railway Co. (Me.) 60 Atl. 550, 69 L. R. A. 300; *Greene v. Louisville Railway Co. (Ky.)* 84 S. W. 1154; *Baldwin*, Street Railway Law, 421. It is a mistake to assume that the look and listen rule, which has found such universal acceptance with the courts in stating the quantum of care which a traveler crossing a steam railroad should ordinarily exercise, applies in all of its vigor to persons proceeding in vehicles along electric railroads in public streets. While the electric street car is expected, over much of its route, to move with comparative swiftness, yet it is a vehicle of the street, and the motorman is expected to exercise reasonable care in dealing with the various conditions with respect to travel that confront him. As stated by Mr. Justice Holmes, in *White v. Worcester Street Railroad Co.*, 167 Mass. 43, 44 N. E. 1052: "Electric cars are far more manageable and more quickly stopped than trains upon steam railroads. Their tracks are in the highway, where all vehicles have a right, not merely to cross, but to travel. In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them; but, subject to that, and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision."

We have not here to deal with a case involving a sudden and unexpected turning of a vehicle on to the track, coupled with a failure to look and listen, as in *Seele v. Boston, etc.*, Street Railway Co., 187 Mass. 248, 72 N. E. 971. If the collision complained of by appellee had occurred just as she turned toward the track, a different question would have been presented, but for some distance she was driving very near the track, and the jury was authorized to conclude that her purpose to go around the wagon should have been apparent to the motorman. See *Goodson v. New York Street Railway Co. (Sup.)* 94 N. Y. Supp. 10. While we recognize that the right of the company is superior in point of precedence, that the driver should not obstruct the operation of the cars, and that a person who without care drives along the track may subject himself to the charge of contributory negligence, yet where, as here, there was an excuse for driving near the track, and some degree of care exercised in respect to looking and listening a short time before the injury, and with the burden resting on appellant to show contributory negligence, we hold that it is not error to submit the question to the jury. It must not be forgotten that a person driving along a street railroad track in broad daylight has a right, at least in some degree, to indulge in the supposition that if a car is approaching from the rear a proper lookout is

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being maintained thereon, and that ordinary care not to injure him will be exercised. *Greene v. Louisville Railway Co.* (Ky.) 84 S. W. 1154; *Ablard v. Detroit United Railway* (Mich.) 102 N. W. 741; *Memphis Street Railway Co. v. Haynes* (Tenn.) 81 S. W. 374. See *Stringer v. Frost*, 116 Ind. 477, 19 N. E. 331, 2 L. R. A. 614, 9 Am. St. Rep. 875.

As is well understood, where a question as to negligence or contributory negligence is presented in such a way that jurors, as reasonable men, might fairly differ as to the deduction to be drawn on that subject, the question becomes a mixed one of law and fact; and so here, in view of the circumstances, and bearing in mind that the burden was on appellant to show contributory negligence, we are of opinion that it cannot be said, as a matter of law, that such defense was made out. *Indianapolis Street Railway Co. v. Schmidt* (Ind. App.) 71 N. E. 663; *Vincent v. Norton*, etc., *Street Railway Co.*, 180 Mass. 104, 61 N. E. 822; *Marden v. Portsmouth*, etc., *Street Railway* (Me.) 60 Atl. 550, 69 L. R. A. 300; *Macon, etc., Co. v. Barnes*, 121 Ga. 443, 49 S. E. 282; *Greene v. Louisville, etc., R. Co.*, supra; *Ablard v. United Railway*, supra; *Rouse v. Detroit Electric Railway*, 135 Mich. 545, 98 N. W. 258, 100 N. W. 404; *Memphis Street Railway Co. v. Haynes*, supra. And see *Evansville, etc., R. Co. v. Gentry*, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378, 62 Am. St. Rep. 421.

Objection is made that a witness was permitted to testify as to the customary speed of cars, running down said incline, at and before the accident. While the record shows that counsel for appellant stated their objections at length to a question concerning such matter, and reserved an exception to the ruling of the court, yet we find no exception reversed to the question by which the answer was finally elicited.

It is claimed that the trial court submitted to the jury a question which was outside of the issues, in instructing with reference to a liability based on the hypothesis of a failure to exercise reasonable care after it became apparent to the motorman that a collision was likely to occur. This, in substance, is the doctrine of last clear chance. The company does, in its preliminary allegations concerning negligence, characterize as negligent a running at a high speed and a failure to sound the gong, but the averment concludes with a charge of negligence in running the car upon and against plaintiff's buggy, thereby injuring her. We are of opinion that the complaint should not be construed on the theory that it required all of the more specific charges of negligence to be proved to make out a case. The specific characterizations of the complaint may give a more vivid idea of the manner in which it was claimed that the accident occurred, but after all, the whole thing, in substance, is a charge that the defendant negligently ran its car into the plaintiff's buggy. Even at common law it was the rule that it was enough if the substance of the issue was exactly proved. *Andrews' Stephen on Pleading*, 176; *Owen v. Phillips*, 73 Ind. 284; *Phoenix, etc.*,

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Co. v. Hinesley, 75 Ind. 1. In such a case as this the injury caused by the wrongful act or omission of the defendant is the gravamen of the action. Harper v. City of Milwaukee, 30 Wis. 365. We are of opinion that appellee was entitled to recover if the jury found that the hypothesis which the instruction contained was maintained by the evidence. As was said in Robbins v. Diggins, 78 Iowa 521, 524, 43 N. W. 306, in considering the propriety of an instruction to the effect that the plaintiff must prove the allegation of negligence as laid, the court said: "The defendants are liable if they negligently ran upon and injured the plaintiff. It was not necessary to show that the speed was 'furious.'" See, also, Busse v. Rogers, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183. In Crowley v. Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918, complaint was made of an instruction as to a liability of the defendant if it failed to use reasonable care after it had discovered the plaintiff's negligence, on the ground that there was no averment to that effect. The court said: "We do not think such an allegation is necessary to be made in the petition. It is a phase of the rights and obligations of the parties which arises upon the proofs rather than by pleading. We know of no rule of pleading which requires the plaintiff in actions of this character to confess negligence on his part and avoid it by alleging that the defendant might have averted the injury by using proper care after the discovery of plaintiff's peril." And so here, appellee had a right, having offered evidence in support of the gist of her charge, to have the question of negligence submitted to the jury, either as she had characterized it or in accordance with the gravamen of the allegation.

Appellant has no reason to complain of instruction No. 8 given by the court. As to the other rulings in the giving or refusal of instructions, concerning which appellant's counsel but little more than suggest error, it may be said that there has been no attempt to comply with rule 22 (55 N. E. v) of this court in respect to such instructions; neither their language nor their substance can be found in the briefs, and therefore we shall not pause to discuss them. See Buchner Chair Co. v. Feulner, 164 Ind. 368, 73 N. E. 816.

Appellant's counsel raise the question as to whether it was entitled to judgment in its favor based on the jury's answers to special interrogatories. We need scarcely say that to justify the sustaining of such a motion the answers must make out a case of such antagonism between them and the general finding on some vital point as not to be capable of being removed by any evidence which would have been admissible under the issues. It is true that the jury stated that the point where appellee began to turn her buggy was not farther than 100 feet from the point where she was struck, but in answer to the question whether there was anything, before she turned, to indicate to the motor-man that she intended to turn to pass the wagon, the jury an-

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swered, "Yes, the wagon." This being true, the motorman was not at liberty to continue to proceed at a high speed and without sounding the gong. *Adams v. Camden, etc., R. Co.*, 69 N. J. Law, 424, 55 Atl. 254.

Judgment affirmed.

GARVICK v. UNITED RYS. & ELECTRIC CO. OF BALTIMORE.

(Court of Appeals of Maryland, June 20, 1905.)

[61 Atl. Rep. 138.]

Street Railroads—Injury to Pedestrian—Negligence—Evidence—Res Ipsa Loquitur.*—Negligence of a street railway company is not inferred from the mere fact that a car struck and injured a pedestrian walking along the track, and in order to recover for the injuries received he must prove negligence on the company's part by affirmative proof.

Same—Failure to Give Signal—Effect.†—The failure of a motorman in charge of a street car to ring the gong is not evidence of actionable negligence in injuring a pedestrian on the track, who knew of the car's approach.

Same—Care in Operation of Cars—Presumption as to Pedestrian on Track.‡—A motorman in charge of a street car has the right to presume that a pedestrian on the track possessing full powers of locomotion, free to escape from danger, will leave the track in time to avoid an injury, especially where he knows that a car is approaching.

Same—Contributory Negligence.—Plaintiff and a companion walked along the track of a street railway company. Plaintiff did not look to see if any car was approaching, nor did he hear a car approach, but his companion called his attention to the fact that a car was approaching. Plaintiff attempted to get off the track, but was struck by the car and injured. His companion succeeded in getting off the track in time to avoid being injured without walking fast. Held, that plaintiff was guilty of contributory negligence as a matter of law, precluding a recovery.

Appeal from Court of Common Pleas; John J. Dobler, Judge.

Action by George Garvick against the United Railways & Electric Company of Baltimore. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before MCSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Thomas G. Hayes, for appellant.

A. D. Foster and George Dobbin Penniman, for appellee.

*For the authorities in this series on the question whether a presumption of negligence arises from the fact of a collision between a car or train and a person on a railroad track, see foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168.

†See foot-notes appended to *Lambert v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575.

‡See foot-notes appended to *Lambert v. Southern Pac. R. Co.* (Cal.), 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575.

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FOWLER, J. This is an action to recover damages for the injury caused by the alleged negligence of the United Electric Railways of Baltimore City. The court below, at the termination of the plaintiff's testimony, withdrew the case from the jury, and instructed them to find a verdict for the defendant. The judgment being against the plaintiff, he has appealed, and the only question presented by the record is the propriety of the ruling above mentioned.

The facts conceded, of course, by the defendant's demurrer to the evidence, are that the plaintiff, George Garvick, together with two companions, was walking along the south-bound track of the defendant company, which is laid on the side of the Falls Road. When they had nearly reached Cold Spring Lane, which is just outside or just within the city limits, a car came along, going south, in the same direction in which they were walking. We give the plaintiff's testimony: "I am the plaintiff. Between five and six o'clock, July 23, 1903, on my way home from Roland Park, I was about at Cold Spring Lane, coming towards the city. As we were coming along, the car came along. We were on the track, and so when a gentleman said, 'I believe there is a car coming,' I started to get off the track, and just as I got outside the track it struck me in the back and knocked me down—right here (indicating over the left hip to the back). At the place where the accident happened the tracks are on a level with the street. When I stepped off the track I was standing up. I don't know what part of the car struck me. I did not hear any bell at all. The warning spoken of came from Mr. McKinny. When he said the car was coming, I tried to get off the track. I stepped to the right. Mr. McKinny stepped to the left. Both of the gentlemen with me stepped to the left, and I went to the right." Cross-examination: "It is not the fender that struck me. The fender wouldn't be up that high on my back. I don't know whether it was the footboard or edge of the car. I couldn't say that. Just as soon as the car came along it struck me, and I don't know what part it was. The fender must have passed me before the car struck me. It was done so quick I don't know how it was done. Was no fender. Just as I stepped across the railing, the car hit me right in the back. I am not very hard of hearing. I can hear all right. * * * The other two men with me went to the left of the track. We all started to get off together. The other men were not struck. My hearing is not of the best. I may be a little deaf. I did not hear any gong. * * * The place where the accident happened was an up-grade, this side of Cold Spring Lane. I was walking up the hill, going the same way with the car. * * * I was in the track. I don't know about the other men. I was in the south-bound track. We were walking three abreast, and talking as we went along. I think one of the two men were in the same track with me. I won't swear about the other."

John T. McKinny, one of the plaintiff's companions, testified as follows: "I knew Mr. Garvick from the time he was working

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at Roland Park. I was with him at the time of the accident. We were coming up from Cold Spring Lane, coming south, up the grade towards the city limits, and were all three walking along. I was walking in the middle, and Mr. Stanbaugh was on the right hand side, and Mr. Garvick on the left; and we were talking, and I looked back, and said, 'Look out, there is a car coming!' and Mr. Stanbaugh and I stepped to the left and Mr. Garvick to the right. I didn't see the car strike him, but I saw him getting up off the ground after the car passed. When I gave the warning I saw Mr. Garvick step over to the right. When he was struck the car was between Mr. Garvick and me. The car was not very far when I hollered. I just looked back, and said, 'Look out, a car is coming!' and Mr. Stanbaugh and I stepped off, and Mr. Garvick he stepped to the other side. I don't think the car was coming fast. I can't say what gait—as they generally come upgrade. I can't say the car was coming fast or slow either. I can't tell whether Mr. Garvick stepped fast or slow as he stepped off the track, because I was getting out the way myself. The tracks where the accident occurred are about even with the street. When I first saw Mr. Garvick after the car passed, he was on his hands and knees, getting up. I can't say positively how far the car was from us when we attempted to get off the track. The car was further than that door of this room when I hollered. I don't wait long for a car to get that close to me before I try to get out of the way, if I see it. Garvick stepped off the same as I did, only on the opposite side. Q. State his manner of getting off the track. A. That is a question I don't see how I can answer. I couldn't tell whether he stepped fast or slow, because I was getting out of the way myself. Q. At what speed were you moving to get out of the way? A. I wasn't going very fast, but I was going fast enough to get out of the way." Cross-examination: "I went with Garvick a part of the way to his home after the accident. I walked with him about one-eighth of a mile. I was in the center of the south-bound track, and Mr. Garvick was to my right. I got out of the way all right."

Calvin Stanbaugh, plaintiff's remaining companion, testified thus: "I live at 507 Hickory avenue, in Woodberry. I heard the testimony of Mr. Garvick. We were all coming home that evening, walking down the track, and I was walking on the north-bound track coming down, and Mr. McKinny and Mr. Garvick were in the south-bound track, and I heard some one say, 'Look out, here comes a car!' and as the car passed by I saw Mr. Garvick getting up; but what part of the car struck him I couldn't say. I don't think the car was coming fast. It was upgrade. Mr. Garvick said he was hurt right smart. When I saw Mr. Garvick getting up, I don't suppose the car was over ten yards at the outside. I didn't pay much attention, but I know the car stopped. If the bell of the car rang, I didn't hear it, because we were walking along talking. The tracks where the accident happened were about even with the street."

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It thus appears that the plaintiff and one of his companions were walking south along, not across, the defendant's south-bound track, and that the other member of the party was walking in the same direction along the north-bound track. The two questions presented by the state of facts disclosed by the record are, first, does the plaintiff's testimony afford any legally sufficient evidence of negligence on the part of the defendant or its servant the motorman? and, secondly, even assuming there was such evidence, was the plaintiff guilty of such contributory negligence as, under all the circumstances of the case, will prevent a recovery?

1. Was the defendant or its motorman guilty of negligence? Before this question can be answered in the affirmative, it is incumbent on the plaintiff to adduce some definite affirmative proof. Negligence of the defendant cannot, in a case like this, be inferred from the mere happening of the accident. It has been repeatedly held by this court that the negligence of a defendant will not be presumed, nor will a surmise or a scintilla of evidence that there may have been negligence on his part justify a court in sending a case to the jury. There must be some reasonable evidence of well-defined facts of negligence of breach of duty on the part of the defendant causing the injury complained of. *United Railways v. Fletcher*, 95 Md. 533, 52 Atl. 608. We have failed to find any such evidence in the record now before us. If there was any culpable negligence which will render the defendant liable, it must be the negligence of the motorman. It is contended on the part of the plaintiff that the motorman was (a) guilty of negligence, because he failed to ring the gong, and (b) because he was running the car recklessly at a high rate of speed.

Assuming that the negative evidence given by the witnesses that they did not hear the gong ring would be ordinarily legally sufficient evidence tending to prove the negligence of the defendant, yet in this case such negative proof can have no probative force, because it is established beyond controversy by the plaintiff's testimony that he had notice from his companion that the car was coming. "The purpose of sounding gongs on street cars is to notify persons on or about to cross the track that the car is approaching, so that they may govern their actions with safety. Where, however, the pedestrian sees the car, and knows of its approach, every purpose of the rule for sounding the gong has been fulfilled. The failure, therefore, of the motorman to sound the gong is not negligence to such pedestrian if the latter sees or knows of the proximity and approach of the car." *Murray v. Transfer Co.* (Mo. Sup.) 75 S. W. 613; *Louisville R. R. v. Colston* (Ky.) 79 S. W. 244. That the plaintiff in this case knew of the approach of the car is beyond question, for his companion McKinny so informed him. Not only so, but McKinny had time to impart to the plaintiff this information and retire to a place of safety.

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(b) The second ground to show negligence on the part of the defendant is the alleged high rate of speed at which the car was running. The evidence affords no foundation for this contention. No witness testified the car was running at an illegal rate of speed, but, on the contrary, both of the plaintiff's companions declared that the car was coming upgrade, and was not coming fast.

(c) But, in addition to this evidence, it is settled in this state, at least, and generally, that where a party is discovered on the track of a railroad in the full power of locomotion, and no impediment to his escape, those on the train may well act upon the assumption that he will use his senses for his protection, and get out of the way of danger before he is struck. *B. & O. Rd. Co. v. State, Use of Schroeder*, 69 Md. 558, 16 Atl. 212; *B. & O. Rd. v. State, Use of Savington*, 71 Md. 595, 18 Atl. 969; *Egner v. United Ry. Co.*, 98 Md. 400, 56 Atl. 789. Hence we think it is clear that the defendant's motorman had a right to presume that the plaintiff and his companions would leave the track for a place of safety, especially as they knew the car was coming. The evidence shows they were notified of the approach of the car by one of their number; but, even in the absence of the evidence of such affirmative proof of notice, it seems incredible that the noise of the car would not of itself have afforded sufficient notice of its approach to persons of ordinary power of hearing who were walking on the tracks in the country free from the noise of the city. We think, therefore, that there is no legally sufficient evidence to be found in the record of negligence on the part of the defendant.

2. But assuming *ex gratia* that the defendant was guilty of negligence, the record affords abundant evidence of the contributory negligence of the plaintiff. In the first place, if it be conceded that the plaintiff was legally on the defendant's tracks, we do not think the cases cited by his counsel to sustain that proposition are at all applicable to the facts of this case. *Cooke v. Balt. Trac. Co.*, 80 Md. 554, 31 Atl. 327; *Lake Roland Co. v. McKewen*, 80 Md. 602, 31 Atl. 797, and *Con. R. Co. v. Armstrong*, 92 Md. 565, 48 Atl. 1047, are all cases in which the injury complained of was inflicted at crossings. In none of them was the injured person walking along, as distinguished from across, the tracks. If the plaintiff voluntarily selected the most dangerous place on the road to walk, it was unquestionably his duty to use at least ordinary care to avoid being injured. He must have known that at any moment a car might approach from behind, and therefore it was his duty to use his senses of hearing and sight for his protection. It does not appear, however, that he at any time looked back, or that he heard the car approaching until informed by his companion McKinny, who says in his testimony: "Garvick stepped off the same as I did, only on the opposite side. I was not going very fast, but I was going fast enough to get out of the way." It would seem to be clear from

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the testimony that the plaintiff not only failed to use his eyes or his ears, but neglected to avail himself of the timely warning given by McKinny. It follows, therefore, that the judgment appealed from will be affirmed.

Judgment affirmed.

ATCHISON, T. & S. F. RY. CO. *v.* FULLER.

(Supreme Court of Kansas, Jan. 6, 1906.)

[84 Pac. Rep. 140.]

Railroads—Injury to Persons in Yards—Assumption of Risk.—One who undertakes to cross the yards of a railroad company in a populous city, at a place other than a public crossing, although on a well-defined path which has been in constant use by the public for a number of years, assumes the risk of injuries from coming in contact with semaphore wires or any other stationary appliances, or devices which are convenient or necessary for the safe operation of trains.

Same.*—A railroad company owes no duty to the public to keep in safe repair for pedestrians a path across its yards, which the public has been in the habit of using for its own convenience without objections. Nor does the fact that no objection has been made imply that the company will not, without special warning, obstruct such path with mechanical appliances and machinery which may become essential or convenient for the safe and proper operation of the business conducted in its yards.

Johnston, C. J., and Mason and Smith, JJ., dissenting.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thomas C. Wilson, Judge.

Action by Ambrose Fuller against the Atchison, Topeka and Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff in error seeks by this proceeding to reverse a judgment obtained against it by A. M. Fuller for personal injuries, which resulted to him from falling over a semaphore wire in its yards in the city of Wichita. In 1879 the right of way now owned by the Atchison, Topeka & Santa Fe Railroad through the city of Wichita was condemned for that purpose. Afterwards one Perry, who was the owner of certain land through which said right of way had been condemned, caused to be surveyed and platted Perry's addition to the city of Wichita, with the streets and alleys dedicated to the public use. In this addition is Mosely avenue running north and south. The avenue has never been opened across the company's right of way.

*For the authorities in this series on the subject of the care due licensees and trespassers on railroad premises, see foot-notes appended to *Louisville & N. R. Co. v. Smith* (Ky.), 18 R. R. R. 148, 41 Am. & Eng. R. Cas., N. S., 148; foot-notes appended to *Hern v. Southern Pac. Co.* (Utah), 17 R. R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179.

Pedestrians on the south, wishing to go north, followed Mosely avenue to the intersection of the right of way, where they crossed the yards of the company by a path, which, according to some of the testimony, had been in constant use for 10 or 12 years, without objection from the railroad company. About six months prior to plaintiff's injury the railroad company placed semaphore wires along the west side of its track and across this path about two feet from the ground. The plaintiff, having business which called him from the north to the south side of the yards, started to cross by this path. After passing upon the right of way and into the company's yards, he came in contact with these semaphore wires and, not knowing they were there, fell over them, and struck his face against the ends of the ties or rails, and received the injuries for which he recovered damages. The negligence charged against the company was placing these semaphore wires across this path without boxing them or putting them under the ground. This was the first time that this plaintiff had ever been in that vicinity, and the first time that he had ever attempted to use this path across the yards of the company. The jury found that the semaphore wires were used as signals for trains; that their maintenance and operation by the company at the time in question were useful and essential for the safe and convenient operation of the trains upon defendant's track; that the defendant's negligence which renders it liable to the plaintiff was in placing the wire across the path without protecting it by boxing and placing the box in the ground.

A. A. Hurd, Wm. R. Smith, O. J. Wood, J. D. Houston, and Alfred A. Scott, for plaintiff in error.

Dale & Amidon and James L. Dyer, for defendant in error.

GREENE, J. (after stating the facts). By reason of changes in the personnel of this court this cause has been twice submitted for reargument, and counsel for both parties have been faithful and diligent in their efforts to assist the court in arriving at a correct conclusion. The path upon which the plaintiff attempted to cross the yards was one that had been traveled by a number of pedestrians living on Mosely avenue south of the company's line of road. It had been so continuously and constantly used that it was well defined, and was of itself an implied invitation to pedestrians to use it to cross from one side of the right of way to the other. The plaintiff was not, therefore, a trespasser, but was there at the implied invitation of the company, resulting from a long and continuous usage of this path by the public without objection by the company. This path, however, passed over the yards of the railroad company in a populous city, where many trains were being operated daily with all appliances and mechanical devices necessary and essential to insure the greatest safety to the traveling public. When the plaintiff entered upon this path, he did so knowing that he was in a city, and would find there railroad tracks and cars and mechanical devices used

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in such railroad yards. The jury in its finding stated that the semaphore wires were useful and essential for the safe and convenient operation of the trains in its yard. He therefore entered upon his passage over the yard chargeable with the knowledge that he would probably have to cross semaphore wires, switches, tracks, and all other devices and appliances convenient or essential for the speedy and safe operation of trains in the most convenient and safest manner known to railroad science. The public safety demands of all railroad companies the employment of such safety appliances, machinery, and other devices, and the law will tolerate none other.

The acquiescence of a railroad company in the crossing of its tracks by pedestrians in order to shorten distances at any particular place does not grant an easement to the public, nor cast upon the company the responsibility of keeping a path thus made, in safe condition for pedestrians. This principle is conceded, but it is stoutly contended that if one who permits his premises to be used by the public as a way shall, without warning, negligently place an obstruction on or so near the passage that injury results to one who was in the exercise of the implied invitation, he would be liable. Conceding this rule, its inapplicability to the facts of this case makes it immaterial. The business conducted in the yard of a railroad company in a city is inherently dangerous to pedestrians, and all persons endeavoring to cross such yards are warned of this fact. No special notice is required of this danger. The danger does not arise entirely from the operation of trains, but from the continual changes made in the surface of the earth. The pedestrian who crosses the yards of a railroad company in the morning, on a path made by constant use of the public, has no assurance that this path will remain unobstructed until noon. Notwithstanding the implied invitation, one who undertakes to cross railroad yards in a city by a path does so knowing that the land upon which he travels has been dedicated to a public use, whose demands are ever changing and increasing, and that these demands must be met by this public utility, and for which purposes the yards are lain with tracks, switches, semaphore wires, and all other machinery and devices known to railroad science for moving cars and trains rapidly and with the greatest safety. This the public demands. Such person assumes the risk of coming in contact with all such useful contrivances and essential devices. The implied invitation is given and accepted upon these conditions.

The rule that one who permits the public to use his property as a passageway cannot have a dangerous place unprotected in close proximity to the passageway without incurring liability for damages is well sustained by the authorities, but such cases are distinguishable from the one under consideration. *De Tarr v. Heim Brewing Co.*, 62 Kan. 188, 61 Pac. 689, which carries the principle to the limit, has no features similar to the present case. There the public had habitually used a path over the vacant part of a lot. Near the path stood a water-closet, under which

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was a vault. The owner of the lot removed the closet and covered the vault with boards, which soon became unsafe and was not repaired. De Tarr in attempting to follow the path, missed her way in the darkness of the night and fell into the vault. That path crossed an unoccupied portion of a lot, not used by its owner in conducting a business which was of itself notice that it was dangerous for the public to use it. Nor was it being used in conducting a business which required the surface to be changed or altered frequently. Nor did the accident come to De Tarr from coming in contact with an instrument necessary in conducting the business on the premises and with the knowledge of the existence of which De Tarr was chargeable. Nor does this case come within the rule of the cases where one undertakes to cross a railroad track or yards upon a well-defined path and is injured by the negligence of the company's employees in the operating of a train. With the rule and the reason stated in such cases by this court we are satisfied. As a matter of law the company was not guilty of negligence in not boxing its semaphore wires at the crossing of the path.

The judgment is reversed, and the cause remanded.

BURCH, PORTER, and GRAVES, JJ., concur.

MASON, J. (dissenting). The railroad company was under no obligation to keep the path in question, where it crossed the track in a condition suitable for the use of foot travelers, but so long as it permitted a state of affairs to exist which amounted to an invitation to the public to use the path it was bound not to do anything to subject a person accepting such invitation to a concealed danger—one which could not be discovered by the use of reasonable diligence. The foot traveler using this path was required to take notice that he might find in proximity to the railroad track any mechanism necessary for the operation of the road provided he could learn of its presence by the ordinary exercise of his faculties. The semaphore wire may have been so nearly invisible as to be considered absolutely so for all practical purposes, in which case the company may be deemed negligent in placing it across the path at such a height that it would likely to trip one using the path, without taking some steps to render it visible or to give notice of its presence. The company was under no obligation to bury or box the wire, but it was a fair matter for the determination of the jury whether under all the circumstances present a reasonable regard for the safety of the public did not require either that the invitation to use the path should be withdrawn by the interposition of some kind of a barrier, or that the wire at this place should have been so marked as to render it plainly visible. Upon these considerations I dissent from the conclusions reached by the majority of the court.

I am authorized to say that CHIEF JUSTICE JOHNSTON and JUSTICE SMITH join in this dissent.

ST. LOUIS, I. M. & S. RY. CO. *v.* GILLIHAN.

(Supreme Court of Arkansas, Feb. 3, 1906.)

[92 S. W. Rep. 793.]

Master and Servant—Acts of Independent Contractor—Liability—Construction of Railroad.*—A railroad company was not liable to a landowner for the conduct of an independent contractor, who, in constructing the road on its right of way over the land, made roads through the land, destroyed rails, and threw down and destroyed fences.

Trespass—Pleading—Issues—Evidence Admissible under Pleadings.—In trespass against a railroad company for damages to plaintiff's land, owing to the destruction of plaintiff's fences, exposing the crops to stock by defendant's contractor, it was error to admit evidence of liability under a contract, in that the company agreed, at the time plaintiffs conveyed a right of way, to replace the fences in time to protect the crops.

Appeal from Circuit Court, Izard County; John W. Meeks. Judge.

Action by W. R. Gillihan against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

B. S. Johnson, for appellant.

J. B. Baker & F. M. Hanley, for appellee.

MCCULLOCH, J. This is an action brought by W. R. Gillihan, the owner of certain lands in Izard county, to recover damages alleged to have been done to the lands by defendant railway company in constructing its road. He alleged that he conveyed to the defendant a right of way 100 feet wide through said lands, but that afterwards defendant entered upon and took an additional strip $7\frac{1}{2}$ feet wide through said land; that defendant's agents and employees took and destroyed 1,000 cedar rails, of the value of \$100; that said agents and employees, without plaintiff's consent, made roads through plaintiff's lands and thereby damaged same in the sum of \$100; and that said agents and employees unlawfully and without authority threw down and destroyed plaintiff's fences, exposing the crops on said land to depredation of stock, which destroyed same, to his damage in the sum of \$500. Judgment was asked in the total sum of \$800. The answer denied that any of the acts complained of were committed by the agents or employees of defendant, and alleged that the railroad was constructed by an independent contractor under a written contract with defendant, and that defendant was not responsible for the acts of said contractor. The jury

*For the authorities in this series on the subject of the liability of railroad companies for the negligence of independent contractors, see foot-notes appended to *Gossett v. Southern Ry. Co.* (Tenn.), 18 R. R. R. 706, 41 Am. & Eng. R. Cas., N. S., 706.

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returned a verdict in favor of the plaintiff, assessing the damages upon each separate item as follows:

For taking land outside of right of way.....	\$ 25 00
For destroying rails.....	50 00
For making roads on land.....	10 00
For destruction of crops.....	75 00
Total.....	\$160 00

The undisputed testimony shows that the railroad was constructed by an independent contractor under a written contract, and that the railway company exercised no control over the work, except the general right of supervision and inspection, so as to ascertain whether or not the work came up to the requirements of the contract. The testimony tended only to show that the acts complained of were committed by the contractors or their agents and servants. A railroad company is not responsible for the wrongful or negligent acts of an independent contractor in the construction of its work. *Railway Company v. Yonley*, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604; *Railway Co. v. Knott*, 54 Ark. 424, 16 S. W. 9; *Martin v. Railway Co.*, 55 Ark. 510, 19 S. W. 314. "An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of the company only as to the result of his work. Generally, where an independent contractor is employed to perform a work lawful in itself and not intrinsically dangerous, the company, if it is not negligent in selecting the contractor, is not liable for the wrongful acts or negligence of such contractor, and in order that the company shall be liable in such a case it must appear that it either exercised or reserved the right to exercise control over the work, or had the power to choose, direct, and discharge the employees of the contractor. In general it may be said that the liability of the company depends upon whether or not it has retained control and direction of the work. But neither the reservation of the power to terminate the contract when in the discretion of the engineer the work is not progressing satisfactorily, the right to exercise general supervision and inspect the work as it progresses, nor the right to enforce forfeitures, will change the relation so as to render the company liable." 3 Elliott on Railroads, § 1063. The same learned author says: "For trespasses by contractors or sub-contractors, which were not the natural result of the work, or were not authorized or directed by the company, no liability attaches to the company." Volume 3, p. 1591. The same principle is announced by Judge Mansfield in *Railway Co. v. Knott*, supra. Now, applying these settled principles to the facts of this case, it is easily discovered that the liability of the railway company for the acts of the contractor or their servants is not established.

The alleged act in destroying cedar rails was plainly an un-

St. Louis, etc., Ry. Co. v. Gillihan

authorized act, and not essential to the performance of the contract. The making of roads also falls within the same category. The testimony of the plaintiff covering this item was as follows: "Q. Now, I will ask you to state, Mr. Gillihan, for what purpose they made these roads? A. Well, as to their purpose, I guess they did it just probably to save going around. There was a good road to their works they could have used just by going a little further around. They either done it for that or else just to show what they could do."

The item of damage for destruction of crops is within the same class. If the fences were on the right of way, it was necessary to throw them down, and either the railroad company or the contractor had the right to do so without subjecting themselves to liability for damages. If they were off the right of way, the act of the contractor in throwing them down was unauthorized, and the railroad company is not liable. The plaintiff undertook to show that the railway company agreed, by verbal contract, at the time he conveyed the right of way, to replace the fences in time to protect the crops; and the court instructed the jury that the company would be liable for damage to crops resulting from its failure to rebuild the fences. The defendant objected to the introduction of the evidence, as well as to the instruction of the court, and saved its exceptions. The evidence tended, if sufficient for any purpose, to establish a contract and a violation thereof; and the instruction permitted a recovery thereon. The complaint does not allege a contract, but a tort. The allegation concerning this item of damage is that "said defendant by its agents and employees unlawfully and without authority threw down and destroyed his fences, thereby exposing his entire crop to the stock," etc. It was error to admit this testimony and to give the instruction. *White River Ry. Co. v. Hamilton* (Ark.) 88 S. W. 978.

As to the remaining item of damage for taking land outside of right of way, it is shown that this was necessary in order to "borrow" sufficient dirt to construct the high "dump" or roadbed, and that the deed executed by plaintiff to the company conveying the right of way provided that the company could take the additional dirt outside of the right of way. The deed was not introduced in evidence, but a witness for the railway company was permitted, without objections, to testify as to its contents, and the same stands undisputed in the record.

On account of the insufficiency of the evidence and the errors already indicated, the judgment must be reversed, and the cause remanded for a new trial, and it is unnecessary to discuss the instructions given and refused, or to determine whether any other errors were committed in that respect.

Reversed and remanded.

RIDDICK, J., not participating.

LOUISVILLE RY. CO. *v.* ESSELMAN.

(Court of Appeals of Kentucky, May 8, 1906.)

[93 S. W. Rep. 50.]

Negligence—Dangerous Premises—Evidence.—One engaged in constructing a building vertically stacked iron beams in the street where he knew children were in the habit of playing. While a child was on the top of the stack, a beam, without any effort on his part, turned over and injured him. Held, that a verdict for the person constructing the building, in an action for the injuries to the child, was properly set aside as against the evidence.

Same—Ordinance—Effect.—An ordinance of a city, permitting an owner engaged in constructing a building to appropriate a part of the adjacent street for the storage of materials, does not relieve the owner from the exercise of such ordinary care in placing the material as may be required by a due regard for the safety of children in the habit of playing in the street.

Same—Liability for Dangerous Premises.*—Where one so stacked iron building material as to be attractive to children, and they went on it to play, and the owner knew it, it was his duty to exercise ordinary care to prevent the stack from being dangerous to children; and if he did not exercise that degree of care, and by reason thereof a child free from negligence was injured, he was liable.

Same—Contributory Negligence.†—It is the duty of a child playing on a stack of building materials to exercise for his own protection the degree of care usually exercised by persons of his age and intelligence under similar circumstances; and where he fails to do so, and by reason thereof he is injured, he is guilty of contributory negligence, precluding a recovery.

Same—Ordinary Care.‡—Ordinary care is the degree of care usually exercised by ordinarily prudent persons under similar circumstances.

Infants—Injuries to Infant Child—Action by Father as Next Friend—Damages.—Where a father, suing as the next friend of his infant child for injuries to the child, seeks to recover compensation for the impairment of the child's capacity to labor and for medical attendance, an instruction authorizing a verdict for permanent impairment of the child's earning power and for medical attendance is not erroneous; the father being estopped thereby from asserting a claim for loss of services during the infancy of the child and for medical expenses.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

*For the authorities in this series on the subject of the negligence of railroad companies in maintaining places and things attractive and dangerous to children, and in failing to warn them of the dangers, see foot-note appended to *Fitzmaurice v. Connecticut Ry. & L. Co.* (Conn.), 18 R. R. R. 788, 41 Am. & Eng. R. Cas., N. S., 788.

†For the authorities in this series on the subject of the care required of minors for their own protection, see foot-notes appended to *Murphy v. Boston Elev. Ry. Co.* (Mass.), 17 R. R. R. 838, 40 Am. & Eng. R. Cas., N. S., 838; foot-notes appended to *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444; foot-note appended to *Christensen v. Oregon Short Line R. Co.* (Utah), 16 R. R. R. 121, 39 Am. & Eng. R. Cas., N. S., 121; foot-notes appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154.

‡See extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

Louisville Ry. Co. v. Esselman

Action by Henry Esselman, by his next friend, against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Farleigh, Straus & Farleigh and *Greene & Van Winkle*, for appellant.

R. C. & J. J. Davis, for appellee.

O'REAR, J. Appellant, under a permit granted by the building inspector of Louisville, was engaged in erecting an addition to its power house on Logan street, in the city of Louisville. It had stacked building material in the street, but using not more than one-third of the street by the side of the building. Some of this material consisted in iron girders, varying from 3 to 18 feet in length, called "I beams." The edges of these girders presented about a 4-inch flat surface, connected at their centers by solid metal, $\frac{1}{2}$ to $\frac{3}{4}$ of an inch thick, and 10 or 12 inches wide. The beams, when stacked standing on their edges, presented a somewhat topheavy body. A number of small children, whose families resided in the neighborhood, were in the habit of playing about the premises. It is indisputably shown that this was done with the knowledge of appellant, and that it had become habitual. Appellee, Henry Esselman, aged 11 years, with some other companions, of the ages of from 8 to 14 years, were among the children who were in the habit of resorting to this pile of material to play. Appellee, on August 27, 1903, climbed to the top of this stack of beams, about 4 feet high, and sat upon it. When he rose to climb down, one of them turned over and caught his leg, severely and permanently injuring it. This suit is to recover damages sustained thereby. There were two trials. The verdict on the first trial was for appellant. It was set aside on a motion and grounds for a new trial, and upon a new trial the verdict was for appellee for \$750.

Appellant complains, first, that the new trial should not have been granted. We are not advised as to which of the grounds enumerated the action of the court was based upon. But, if for no other, it might well have been rested upon the one that it was not supported by the evidence. Briefly stated the evidence was: That the railway company knew that the premises where the beams were stacked were used by small children for playing. Its superior officers directed the beams to be stacked where and as they were. One of the beams turned over without any effort on the part of appellee, inflicting the injury stated. The manner of stacking the beams was not safe. We think, from the description given of them in the evidence, as well as from the admission of appellant's witnesses, that they should have been laid flat, instead of vertically. At least, standing upon their edges, they were somewhat dangerous. If, when so placed, they were not exactly upright, the tendency to topple over would increase in proportion as they were out of plumb. It was not shown whether they were laid so as to be plumb. But the fact that one

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of these heavy iron beams did topple over without other force being applied than the weight of a small boy sitting upon it proves of itself that it was not set on a level surface. The thing speaks for itself that it was negligently stacked, having in view the safety of children playing upon and about it. Under these facts the evidence clearly pointed to a verdict for appellee, and not for appellant. The trial judge ought to have granted the new trial on this ground alone. His discretion in the matter, when so exercised, is not only free from error but commendable.

There is an ordinance of the city of Louisville which permits owners of lots engaged in repairing or constructing buildings to appropriate temporarily not more than one-third of the adjacent street for the storage of material. This ordinance does no more than license the lot owner to use the street for the purpose named for a reasonable length of time. Otherwise the presence of the material would constitute a public nuisance. The ordinance changes the character of the possession of so much of the street from a wrongful to a rightful one. This, however, does not give the lot owner any right in the street, as to placing his material thereon, to observe less than such ordinary care in so placing it as may be required by a due regard for the safety of all persons having a right to pass along the adjacent highway, as well as all persons licensed to go upon the occupied premises, and those whose presence thereon, whether licensees or not, might reasonably be expected or known. It is the instinct of children of the age of appellee to play. Building material, stacked as this was, is peculiarly attractive to them. This is a fact known of every one. In a populous community this instinct is more than likely to find vent in availing itself of such temptation. Warnings are not enough to make the premises reasonably safe. The material should be stacked so, with the knowledge that the premises will be probably so used in spite of warnings and precautions of the lot owner, that the children playing thereabout will not be subjected to the hazards of falling timbers and material insecurely put up. The ordinance in question did not license appellant to set a dead-fall in the street to catch unwary children, mischievously or prankishly wandering within the forbidden zone. The law is, on the contrary, that the builder must anticipate their presence with a knowledge of their nature, and provide against accident to them as far as may reasonably be within his power. The instinct of humanity fathers this rule of the law.

The instructions with commendable clearness presented the law of the case and are as follows: "(1) The court instructs the jury that the defendant had the right to stack the iron building material where it was at the time plaintiff was injured, using ordinary care in so doing; but if it was so stacked as to be attractive or inviting to children to go upon it, and they did go upon it to play, and the defendant, or its agents or employees, knew that fact, it was the duty of the defendant to

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exercise ordinary care to prevent the said stack of material from being dangerous to children so using it; and if the jury shall believe from the evidence that the defendant, or its agents or employees, did not exercise that degree of care for the protection from injury of the children who so used the said stack, and that by reason of that failure the plaintiff received the injury of which he complains, then the law is for the plaintiff, and they should so find, unless they shall further believe from the evidence that the plaintiff was negligent, and thereby helped to cause or bring about his injuries, and but for which he would not have been injured, as defined in instruction No. 2. (2) It was the duty of the plaintiff at the time mentioned in the petition to exercise for his own protection from injury the degree of care usually exercised by persons of his age, experience, and intelligence under the same or similar circumstances; and if he failed to exercise that degree of care, and by reason of such failure, if any there was, helped to cause or bring about his injury, and but for such failure or contributory negligence he would not have been injured, then the law is for the defendant, and they should so find. (3) If the jury find for the plaintiff, they should award him such sum in damages as will compensate him for any expenses to which he was put, or medical attention or medicine, not exceeding the sum of \$195, the amount claimed in this behalf in the petition, and in such further sum as will reasonably and fairly compensate him for any pain or suffering, mental and physical, caused him by his injury, and for any permanent impairment of his power to earn money, if any there is, directly resulting from his injury, not exceeding in all the sum of \$5,195, the sum claimed in the petition. If they find for the defendant, they will say so, and no more. (4) Ordinary care is the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. (5) Contributory negligence means, in this case, the failure of the plaintiff, if he did so fall, to use the degree of care usually exercised by ordinarily careful and prudent persons of his age, experience, and intelligence under the same or similar circumstances, and by reason of such failure helped to cause or bring about the injury of which he complains, when he would not have been injured but for such failure."

Another objection urged by appellant is that the infant was not entitled to his own services until he was 21 years of age, nor could he have incurred a physician's bill. While it may be true that the father of appellee may have been entitled to his services, and therefore to recover for the impairment of his capacity to labor until he was 21 years old, yet the father sues in this case as the next friend of the infant. He asks that the infant be allowed to recover the whole of the compensation for the impairment of his capacity to labor, which is likewise true concerning the physician's bill. As the father is estopped by this state of the record from ever asserting a claim on his own

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behalf against appellant for these items, having by this suit given them, as it were, to a child, the objection is not available to appellant that the instruction was erroneous.

We perceive no prejudicial error in the record, and the judgment is affirmed.

LITTLE ROCK RY. & ELECTRIC CO. *v.* NEWMAN.

(Supreme Court of Arkansas, Feb. 10, 1906.)

[92 S. W. Rep. 864.]

Street Railroads—Operation—Collision with Animals.*—In an action against a street railroad for the killing of a hog, the burden is on plaintiff to show that the hog was killed through the negligence of defendant.

Same—Contributory Negligence of Owner.†—Where in an action against a street railroad for the killing of a hog, it appeared that the hog was outside of the stock limit, it was not contributory negligence to allow it to run at large.

Evidence—Res Gestæ.‡—In an action against a street railroad for the killing of a hog, it was proper to admit evidence that the motorman remarked at the time "that the hog jumped on the track right in front of the car."

Street Railroads—Killing Animals—Liability.—In an action against a street railroad company for the killing of a hog, plaintiff was not entitled to recover in the absence of evidence that the hog went on the track in front of the motorman in time for him to have stopped the car before striking it, had he seen it and used all the means in his power to that end.

Same—Operation—Damages to Property—Statutes—Application to Street Railroads.||—Kirby's Dig. § 6773, making railroads responsi-

*For the authorities in this series on the question of presumption of negligence and burden of proof in actions against railroads for running their trains over stock, see foot-notes appended to *Atlantic & B. Ry. Co. v. Smith & Son* (Ga.), 18 R. R. R. 489, 41 Am. & Eng. R. Cas., N. S., 489; foot-notes appended to *Cincinnati, etc., R. R. v. Burgess* (Ky.), 18 R. R. R. 160, 41 Am. & Eng. R. Cas., N. S., 160; *Southern Ry. Co. v. Hoge* (Ala.), 17 R. R. R. 792, 40 Am. & Eng. R. Cas., N. S., 792; *Ramsbottom v. Atlantic Coast Line R. Co.* (N. Car.), 17 R. R. R. 776, 40 Am. & Eng. R. Cas., N. S., 776; foot-notes appended to *Western & A. R. Co. v. Clark* (Ga.), 15 R. R. R. 440, 38 Am. & Eng. R. Cas., N. S., 440; *Alabama & N. R. Co. v. Boyles* (Miss.), 15 R. R. R. 431, 38 Am. & Eng. R. Cas., N. S., 431; *Beaudin v. Oregon Short Line R. Co.* (Mont.), 14 R. R. R. 208, 37 Am. & Eng. R. Cas., N. S., 208.

†For the authorities in this series on the question whether a railroad can be held liable for running over stock unlawfully at large, see foot-notes appended to *Laronde v. Boston & M. R. R.* (N. H.), 16 R. R. R. 223, 39 Am. & Eng. R. Cas., N. S., 223; *Southern Ry. Co. v. Hoge* (Ala.), 17 R. R. R. 792, 40 Am. & Eng. R. Cas., N. S., 792.

‡For the authorities in this series on the question whether the declarations of railroad employees are *res gestæ*, see foot-notes appended to *Illinois Cent. R. Co. v. Houchins* (Ky.), 18 R. R. R. 850, 41 Am. & Eng. R. Cas., N. S., 850; *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 18 R. R. R. 542, 41 Am. & Eng. R. Cas., N. S., 542.

||For the authorities in this series on the question whether street railways are "railroads" within the meaning of certain statutes, see

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exercise ordinary care to prevent the said ~~st~~ being dangerous to children so using it: ~~st~~ believe from the evidence that the def~~endants~~ employees, did not exercise that degr~~ation~~ tion from injury of the children w~~hich~~ and that by reason of that failure th~~at~~ of which he complains, then the l~~aw~~ should so find, unless they sha~~ll~~ dence that the plaintiff was cause or bring about his inj~~ury~~ not have been injured, as d~~efendant~~ was the duty of the plaintiff

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14 R. R. R. 715, 37 Am. & Eng. R. Cas., N. S., 715; Daly, B. & T.

Co. v. Great Falls St. Ry. Co. (Mont.), 16 R. R. R. 692, 39 Am. &

Eng. R. Cas., N. S., 692.

¶For the authorities in this series on the subject of the care re-

quired of trainmen to avoid running over stock, see foot-note ap-

pended to Atlanta & W. P. R. Co. v. Hudson (Ga.), 18 R. R. R.

490, 41 Am. & Eng. R. Cas., N. S., 490; Georgia Southern & F. Ry.

Co. v. Jones (Ga.), 18 R. R. R. 154, 41 Am. & Eng. R. Cas., N. S.,

154; foot-notes appended to Carman v. Montana Cent. Ry. Co.

(Mont.), 17 R. R. R. 795, 40 Am. & Eng. R. Cas., N. S., 795; Atlantic

Coast Line R. Co. v. Waycross Elec. L. & P. Co. (Ga.), 17 R. R. R.

208, 40 Am. & Eng. R. Cas., N. S., 208; Southern Ry. Co. v. Henry

(Ga.), 17 R. R. R. 198, 40 Am. & Eng. R. Cas., N. S., 198; foot-

notes appended to Borneman v. Chicago, etc., Ry. Co. (S. Dak.), 16

R. R. R. 464, 39 Am. & Eng. R. Cas., N. S., 464; Laronde v. Boston

& M. R. R. (N. H.), 16 R. R. R. 223, 39 Am. & Eng. R. Cas., N. S.,

223; O'Leary v. Chicago, etc., Ry. Co. (Iowa), 16 R. R. R. 141, 39

Am. & Eng. R. Cas., N. S., 141.

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exercise of ordinary care and prudence, striking the hog. If you find from the evidence that the motorman exercised ordinary and reasonable care after he discovered the danger to the hog, then your verdict will be for the defendant.

If you find from the evidence that the motorman was guilty of a failing to properly care for the hog, such negligence directly complained of, your verdict should be for the plaintiff. If you further find that defendant's car became aware of the danger to the hog and avoided injuring it by the exercise of ordinary care, then your verdict will be for the defendant.

The instruction, as modified, was as follows: "You are instructed that if you can find for the plaintiff you must find from the evidence that the hog went upon the track and was seen by the motorman of the car, or could have been seen by him in the exercise of ordinary care in operating the car, when the car was at a sufficient distance away to have permitted him, by the exercise of ordinary care and prudence, to stop the car before striking the hog. If you find from the evidence that the motorman exercised ordinary and reasonable care to avoid the accident after he discovered the danger to the hog, and was unable to do so, then your verdict will be for the defendant."

The instruction given after the case was submitted was as follows: "Gentlemen, this is a case peculiarly within the province of the jury to decide. The facts are as fully before you as they can be put before any jury. The law is plain and simple. The amount is small. It costs the county more to try this case than is involved to either of the litigants, and it is the earnest desire of the court that you decide this case, if you can, without giving up your honest and conscientious conviction."

Rose. Hemingway, Cantrell & Loughborough, for appellants.
A. J. Newman, for appellee.

WOOD, J. This appeal seeks to reverse a judgment against appellant recovered by appellee for the alleged negligent killing of a certain hog.

The proof showed that the hog was killed by one of appellant's cars. And there was evidence from which the jury might have found that the motorman in charge of the car was negligent; but there is no evidence that the negligence of the motorman was the proximate cause of the injury. There is no proof that the motorman saw or could have seen the hog in time, by the use of ordinary care, to have prevented striking it. There was proof that the track was straight, and that the motorman might have seen a hog, had it been on the track in front of him. But there is no proof that the hog came on the track in front of the motorman in time for him to have stopped the car before striking it, had he seen it and used all the means in his power to that

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The items having by this court been
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end. On the contrary, it was in evidence that the motorman remarked at the time: "That the hog jumped on the track right in front of the car." This was objected to, but the declaration was a part of the *res gestæ* and proper testimony. *Railway v. McGinty* (Ark.) 88 S. W. 1001. This was the only evidence as to how the hog got on the track. The hog was outside the "stock limit," and it was not, therefore, contributory negligence for it to be running at large. *Railway v. Finley*, 37 Ark. 562; *Railway v. Morrison*, 69 Ark. 289, 62 S. W. 1045.

The burden was upon the appellee to show that the hog was killed through the negligence of the appellant. She has failed to do this; for under the proof in this record there is nothing to show that the hog would not have been killed, even if the motorman had been keeping the proper lookout and had used every means known on a properly equipped car to avoid it. Section 6773, Kirby's Dig., making all railroads responsible for all damages to property caused by the running of trains in this state, is not applicable to street railways. They do not run trains in the sense in which the term was intended by the lawmakers. The whole Act February 3, 1875, shows that the Legislature did not have in mind street railways. This court since *Railway v. Payne*, 33 Ark. 816, 34 Am. Rep. 55, has often held under this statute that, where stock is killed by the running of trains, there is a presumption that such killing was through the negligence of the company operating such trains. *Railway v. Russell*, 64 Ark. 236, 41 S. W. 807; *Railway v. Bragg*, 66 Ark. 248, 50 S. W. 273; *Railway v. Wilson*, 66 Ark. 414, 50 S. W. 995; *Railway v. Costello*, 68 Ark. 32, 56 S. W. 270. But no such presumption prevails in the case of street railways. In such cases it is not a question of presumption, but a matter of proof. *Hot Springs Street Ry. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245. Doubtless the presumption that is indulged under the statute applicable to railroads running trains was invoked below, as it has been here to uphold this verdict which is otherwise without proof to support it. The court should have given the first instruction asked by appellant.

The court did not err in refusing requests 4 and 6. The fourth, as modified, was objectionable because it was abstract; there being no evidence to support it.

The instruction given to the jury after the case had been submitted (reporter set out in note) was in bad form, if not erroneous and prejudicial. *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425. But it is unnecessary to determine whether it was reversible error. We assume it will not be repeated on another trial.

For the error indicated, the judgment is reversed, and the cause is remanded for new trial.

FITZMAURICE *v.* NEW YORK, N. H. & H. R. R.

(Supreme Judicial Court of Massachusetts, Middlesex, May 18, 1906.)

[78 N. E. Rep. 418.]

Carriers—Who are Passengers.*—Rev. Laws, c. 111, § 228, provides that a railroad may make contracts for the conveyance of passengers at such reduced rates of fare as the parties may agree on. Held, that one riding on a ticket procured at a reduced rate by false representations to the effect that she was a student at a certain school was not a passenger.

Report from Superior Court, Middlesex County; Loran E. Hitchcock, Judge.

Action by one Fitzmaurice against the New York, New Haven and Hartford Railroad. Verdict for defendant, and the case reported to the Supreme Judicial Court. Judgment on the verdict.

J. J. Shaughnessy, for plaintiff.

John L. Hall and *Arthur J. Young*, for defendant.

SHELDON, J. The plaintiff, while riding upon a train of the defendant, was injured by reason of a collision; and no question is made but that she should have been entitled to a verdict in her favor if she had the rights of a passenger. She was a minor. She was riding upon a three months season ticket which was good only for students under 18 years of age. She had obtained this ticket by presenting to the defendant's ticket agent a certificate purporting to be signed by her father that she was under 18 years of age and was a pupil in the Hollander Art School, Boston, and agreeing that she would not use the ticket otherwise than in going to and from the school, and also presenting a certificate purporting to be signed by "J. F. Miner, Principal, Hollander Art School, Boylston St., Boston, Mass.," that she was a pupil in his school and as he fully believed intended to remain so for the next three months. She was at this time over 18 years of age, as she testified, lived in Marlboro, and was employed in Hollander's dry goods store in Boston. The regular price for a season ticket was \$32; the reduced rate for students under 18 years of age, at which the plaintiff pro-

*For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to *Conroy v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 384, 42 Am. & Eng. R. Cas., N. S., 384; foot-notes appended to *Chicago, etc., R. Co. v. Troyee* (Neb.), 19 R. R. R. 350, 42 Am. & Eng. R. Cas., N. S., 350; foot-notes appended to *Robertson v. Boston & N. St. Ry. Co.* (Mass.), 19 R. R. R. 123, 42 Am. & Eng. R. Cas., N. S., 123; *Chicago Union Traction Co. v. O'Brien* (Ill.), 19 R. R. R. 95, 42 Am. & Eng. R. Cas., N. S., '95; *McDonald v. Central R. Co.* (N. J.), 19 R. R. R. 58, 42 Am. & Eng. R. Cas., N. S., 58; foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

cured it, was \$16. She had been riding upon this ticket nearly every day except Sunday for over a month, and the coupons had been received by the conductor. Upon the face of the ticket were the words, "Good only for a person under 18 years of age." The jury having found the amount of the plaintiff's damages if she was entitled to recover, the judge ordered a verdict for the defendant, and reported the case to this court, with the stipulation that if she is entitled to recover, judgment is to be entered in her favor for that amount; otherwise, there is to be judgment on the verdict.

The defendant had the right to establish a reduced rate for students under a fixed age. Rev. Laws, c. 111, § 228. A statute requiring similar action by street railway companies was sustained by this court in a recent case. *Com. v. Interstate Consolidated St. Ry.*, 187 Mass. 436, 73 N. E. 530. The plaintiff knew that she did not come within the class to which this offer of a reduced rate was made, and obtained her ticket by presenting certificates of facts which she knew to be false. She thus obtained by false representations a ticket to which she knew that she was not entitled. Whatever rights she had to be regarded as a passenger on the defendant's train she had acquired solely by the fraud which she had practiced upon the defendant. She had no right to profit by her fraud; she had no right to rely upon the consent of the railway company to her entering its train as a passenger, when she had obtained that consent merely by gross misrepresentations. Accordingly she was not lawfully upon the defendant's train; she was in no better position than that of a mere trespasser. This principle has been affirmed in other jurisdictions. Thus it has been held that a person traveling over a railroad on a free pass or a mileage ticket which had been issued to another by name and was not transferable, was barred by his fraudulent conduct from recovering for a personal injury unless it was due to negligence so gross as to show a willful injury. *Toledo, Wabash & Western Ry. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613. *Way v. Chicago, Rock Island & Pacific Ry.*, 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431. If the plaintiff had fraudulently evaded the payment of any fare, she certainly would not have become a passenger, and the defendant's utmost duty to her while she was upon its train would have been to abstain from doing her any willful or reckless injury. *Condran v. Chicago, Milwaukee & St. Paul Ry.*, 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A., 749; *Toledo, Wabash & Western Ry. v. Brooks*, 81 Ill. 245; *Chicago, Burlington & Quincy R. R. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17. But such a case cannot be distinguished in principle from the case at bar, in which the plaintiff obtained her ticket at a reduced price by successfully practicing a fraud. The only relation which existed between the plaintiff and defendant was induced by her fraud; and, as was said by the court in *Way v. Chicago, Rock Island & Pacific Ry.*, *ubi supra*, she cannot be allowed to set up that relation against the defendant as a basis of recovery. See,

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also, to the same effect *Godfrey v. Ohio & Mississippi Ry.*, 116 Ind. 30, 18 N. E. 61; *McVeety v. St. Paul, Minneapolis & Manitoba Ry.*, 45 Minn. 268, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728; *McNeill v. Durham R. R. (N. C.)* 44 S. E. 34, 67 L. R. A. 227.

Nor is the plaintiff helped by the fact that the defendant's conductors had accepted the coupons of her ticket. This simply showed that she had succeeded in carrying her scheme to completion. There had been a similar acceptance by the conductor in *Way v. Chicago, Rock Island & Pacific Ry.*, and *Toledo, Wabash & Western Ry. v. Beggs*, *ubi supra*. If the defendant's conductors did not know the real facts, their acceptance of her coupons could have no effect; if they knew the facts and acquiesced in the plaintiff's wrongful purpose, this conduct could give her no additional rights. *McVeety v. St. Paul, Minneapolis & Manitoba Ry.*, and *Condran v. Chicago, Milwaukee & St. Paul Ry.*, *ubi supra*.

The cases relied on by the plaintiff do not support her contention. In *Galveston, Harrisburg & San Antonio Ry. v. Snead*, 4 Tex. Civ. App. 31, 23 S. W. 277, *Ohio & Mississippi Ry. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336, and *Austin v. Great Western Ry.*, L. R. 2 Q. B. 442, no question of fraud was involved. The same is true of *Foulkes v. Metropolitan District Ry.*, 4 C. P. D. 267, and 5 Id. 157. In *Doran v. East River Ferry*, 3 Lans. (N. Y.) 105, the plaintiff was allowed to recover on the ground that the defendant's servants had negligently failed to demand her fare, and that her injury was due to gross negligence. We have found no decision which would support a recovery under circumstances like those before us. The plaintiff's counsel very properly has not claimed that there was evidence of any such gross or wanton negligence as to entitle her to recover in spite of her rights being only those of a trespasser. *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594.

According to the terms of the report there must be Judgment on the verdict.

DAHROOGE v. PERE MARQUETTE R. CO.

(Supreme Court of Michigan, July 3, 1906.)

[108 N. W. Rep. 283.]

Carriers—Baggage—Merchandise Carried as Baggage—Notice of Nature of Goods.*—In order to charge a railroad company with liability for articles of merchandise tendered and accepted as baggage, it need not be shown that the agent of the railroad company

*For the authorities in this series on the question, what constitutes a passenger's baggage, see foot-notes appended to *Little Rock, etc., Ry. Co. v. Records (Ark.)*, 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664; *Yazoo & M. V. R. Co. v. Georgia Home Ins. Co. (Miss.)*, 15 R. R. R. 766, 38 Am. & Eng. R. Cas., N. S., 766; foot-notes ap-

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was expressly notified that the articles were merchandise, but it is sufficient if the agent had notice or knowledge sufficient to put him on inquiry.

Trial—Argument—Failure to Call Witnesses.†—In an action against a railroad company to recover damages for loss of baggage, a statement of plaintiff's attorney in argument that no witness had been called to show that the goods contained in the baggage were not worth what plaintiff claimed them to be, that if the defendant had had a good defense it would have brought witnesses to testify that the goods were not of such value, and that the defendant had behind it all the money it needed to do business, was not cause for reversal. although the reference to defendant's ability to procure witnesses should have been omitted.

Error to Superior Court of Grand Rapids; William J. Stuart, Judge.

Action by George Dahrooge against the Pere Marquette Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before CARPENTER, C. J., and MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ.

Charles McPherson (*F. W. Stevens*, of counsel), for appellant.

G. A. Wolf (*S. Wesselius*, of counsel), for appellee.

CARPENTER, C. J. The plaintiff is a merchant, who travels from place to place by rail, taking with him his stock, consisting, in large part, of fine silk apparel for ladies. On October 25, 1904, he was at Ludington, and, desiring to go to Traverse City, purchased a ticket over defendant's line and had his goods checked as baggage. He had four parcels with him—one zinc trunk, two large telescopes, and a hand satchel. The last he did not check, but the first three were checked and marked on the agent's memorandum, "Z. T., Tel. and S. C.," meaning zinc trunk, telescope, and sample case. Plaintiff testified that he told the agent that he was a sample merchant. The agent testified that plaintiff said nothing to him as to the contents of the baggage and that he did not have any knowledge of its contents. One of the telescopes was never delivered to plaintiff, and this action was brought to recover the value of its contents. Judgment passed for plaintiff in the sum of \$1,325. Defendant brings error.

The trial judge charged the jury as follows: "If a passenger ships merchandise in his trunk, without notice to the railroad company or knowledge on its part of the contents of the trunk, the company is not responsible for its loss. It is the duty of the passenger to give the carrier notice that his trunk contains

pended to *Battle v. Columbia, etc., R. R. (S. Car.)*, 14 R. R. R. 425, 37 Am. & Eng. R. Cas., N. S., 425.

†For the authorities in this series on the subject of arguments and remarks of counsel reflecting on the credibility of witnesses, etc., see foot-notes appended to *Illinois Cent. R. Co. v. Proctor (Ky.)*, 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

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merchandise, or things which cannot be included as baggage, unless the carrier has knowledge that the contents of a trunk are not baggage but merchandise. For the purpose of showing that the defendant had notice, you have heard the testimony of the plaintiff as to his conversation with the baggageman Smith, at Ludington, when he checked the baggage. You have also heard the testimony of Baggageman Smith in regard to what took place, and it is for you to say whether the baggageman, Mr. Smith, was notified or had sufficient knowledge from the facts surrounding the case that the contents of this telescope was merchandise or not. The notice to the railroad or its agent need not be an express notice if the agent or the company had sufficient notice or knowledge of the facts to put a person on inquiry it is equivalent to notice. If you find, by a fair preponderance of the evidence, that the plaintiff was a passenger as claimed, and that he informed the defendant's agent, the baggageman at Ludington, when he checked the baggage and telescope, that they contained samples or merchandise, and that they had notice in any way, and that the goods in question while in transit were lost by the defendant's negligence, such information is sufficient notice to render the defendant liable for such negligent loss; but if, on the other hand, you do not find, by a fair preponderance of the evidence, that the plaintiff informed the baggageman, the agent at Ludington, when he checked the baggage, or that he and the company did not know the character of the baggage, that the telescope in question contained samples or merchandise, I say, if you do not find that to be the fact, that would be the end of the case, and your verdict would have to be no cause of action. But the passenger cannot require the railroad company to carry as baggage to be checked on his ticket articles of merchandise which the passenger carries to sell or exhibit as samples. The articles of women's wearing apparel which the plaintiff claims to have lost were not such articles as he was entitled to have checked as his personal baggage; but unless, as I have said, you find that the agent of the defendant who received such articles at Ludington as plaintiff's baggage was notified, or the company had knowledge, that the satchel or telescope which the plaintiff claims to have lost contained articles of merchandise not intended for the personal use of the plaintiff on his journey, your verdict must be for the defendant."

Error is assigned upon that portion of the instruction which states that notice to the agent need not be express notice, but that, if the agent or the company has sufficient notice or knowledge to put a person on inquiry, it is equivalent to notice. In view of the issue presented, it must be inferred that the jury would understand from this instruction that the agent must, before liability could be affirmed, be found to have had knowledge that the parcels contained something other than the plaintiff's personal luggage. In *Amory v. Wabash R. R. Co.*, 130 Mich. 407, 90 N. W. 23, it was said: "It is the duty of the pas-

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senger to give the carrier notice that his trunk contains merchandise or things which cannot be included as baggage, unless the carrier has knowledge that the contents of the trunk are not baggage, but merchandise." It was also held that knowledge was equivalent to notice. And in that case it was permitted the jury to find knowledge without proof of direct notice. It would seem to follow that notice of such facts as show that the agent had direct knowledge that the plaintiff was sending something other than his personal luggage was sufficient to call upon the agent to make inquiry. Wade on Notice, § 11. A charge in the language of the one under consideration was distinctly approved in *Railway Co. v. Millinery Co.* (Tex. Civ. App.) 29 S. W. 196. See, also, *Sloman v. Railway Co.*, 67 N. Y. 208. In *Railway Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111, it was said: "When a passenger presents to the carrier for transportation his goods and chattels, and makes known what they are or exposes them to view or packs them in a way to give to any one concerned good reason to understand and know that they are not usually carried as baggage, and demands transportation of them as his luggage, and the carrier receives and carries them accordingly, he will be responsible for them as baggage, notwithstanding he was not bound to accept and transport them as such." See note to this case in 36 L. R. A. 781, where the cases are collated.

In the course of the argument of plaintiff's counsel, he used the following language: "They brought a man over here from Friedman's to do what? To swear that these goods had a certain value. If they had a good defense in this case, they would have come here with witnesses to swear that there were no goods of this value made to sell. That would have been a good defense. This town is full of silk houses and dry goods clerks. Have you heard from a single witness in this case who comes here to testify that garments of this rustle silk and Chinese silk, worth \$35 to \$60, are not made and are not sold to these women? No; not a word about that. This railway company has behind it all the money it needs to do business. Mr. McPherson: I take an exception to that statement. Mr. Wesselius: Is there any harm in saying that the railway company has money sufficient to do business with. It is within their province and it was within their power to take the deposition of the one man who brought these goods to the city of Grand Rapids." No request was preferred to the court covering the subject; but on a motion for a new trial it was urged that this was prejudicial to defendant, and error. The case of *Cavanaugh v. Riverside Twp.* (Mich.) 99 N. W. 876, is cited in support of this claim. In that case the comment on defendant's failure to call a witness went farther. Plaintiff's counsel undertook to tell the jury what the witness would have been compelled to testify to if placed on the stand. In the present case the comment called attention to the absence of testimony only. While the reference to the

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defendant's ability to procure witnesses should have been omitted, we agree with the trial judge that it was not calculated to prejudice the jury. No appeal was made to the jury, except one based on the absence of testimony to meet the case made by the plaintiff.

No error appears. Judgment affirmed.

McDONOUGH v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 17, 1906.)

[78 N. E. Rep. 141.]

Carriers—Passengers—Injuries—Negligence—Question for Jury.—Evidence in an action against a street railway company for injuries to a passenger riding on the front platform of a car, received while attempting to alight in consequence of the sudden starting of the car, examined, and held, that the question of the company's negligence was for the jury, in the absence of proof of rules relating to passengers riding on the platform and evidence that the passenger knew of such rules.

Same—Contributory Negligence—Question for Jury.—Evidence in an action against a street railway company for injuries to a passenger riding on the front platform of a car, received while attempting to alight in consequence of the sudden starting of the car, examined, and held, that the question of his contributory negligence was for the jury, in the absence of evidence of rules relating to passengers riding on the front platform and evidence that the passenger knew of such rules.

Same—Rules Regulating the Transportation of Passengers—Effect.*—Where a carrier establishes a rule either prohibiting passengers from riding on the front platform of its cars, or stating that if passengers ride on the front platform they do so at their own risk, a passenger, who with knowledge of the first rule, intentionally violates it, or with knowledge of the second rule chooses to take the risk, cannot recover for an injury thereby received.

Same—Proof of Rules.—That a street railway company had established a rule providing that if passengers chose to ride on the front platform of a car, they did so at their own risk, may be proved by the testimony of a passenger riding on the front platform of the car and suing for injuries received while alighting from the car.

Same.—Where a passenger knew that on certain cars of a street railway company there was a notice stating that passengers choosing to ride on the front platform did so at their own risk, it was not necessary for the company, in order to defeat an action by the passenger for injuries received while alighting from the front plat-

*For the authorities in this series on the subject of the contributory negligence of passengers in violating rules and regulations of the carrier, see foot-notes appended to *Cincinnati, etc., R. Co. v. Lohe* (Ohio), 8 R. R. R. 447, 31 Am. & Eng. R. Cas., N. S., 447.

For the authorities in this series on the question whether it is contributory negligence in a passenger to ride on the platform, see foot-notes appended to *Chicago City Ry. Co. v. McCaughna* (Ill.), 18 R. R. R. 262, 41 Am. & Eng. R. Cas., N. S., 262; *Kirchner v. Oil City St. Ry. Co.* (Pa.), 15 R. R. R. 711, 38 Am. & Eng. R. Cas., N. S., 711; *Chicago & W. I. R. Co. v. Newell* (Ill.), 15 R. R. R. 706, 38 Am. & Eng. R. Cas., N. S., 706; *Morgan v. Lake Shore & M. S. Ry. Co.* (Mich.), 15 R. R. R. 675, 38 Am. & Eng. R. Cas., N. S., 675.

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form of a car, to prove that he also had seen such notice on the particular car on which he was riding.

Same—Waiver of Rules.—That a street railway company regularly permitted passengers to ride on the front platform of its cars, did not show a waiver on its part of a rule providing that if passengers chose to ride on the front platform, they did so at their own risk.

Evidence—Declaration of Servant.—Admissions of liability made by a servant who is not a general agent or while not engaged in the performance of a duty are inadmissible to bind the master.

Same.—Proof that a motorman stated immediately after an accident to a passenger sustained while attempting to alight from a car that he was under the impression that the passenger had previously left the car was admissible in support of the passenger's claim that he was thrown off by the sudden jerk of the car occasioned by the negligence of the motorman.

Appeal—Harmless Error—Erroneous Exclusion of Evidence.—Where, in an action against a street railway company for injuries received by a passenger while attempting to alight from a car, there was a failure to show a violation of any duty owed by the company to the passenger the erroneous exclusion of evidence proving a statement made by the motorman immediately after the accident, was immaterial.

Exception from Superior Court, Suffolk County; Elisha B. Maynard, Judge.

Action by Thomas McDonough against the Boston Elevated Railway Company. There was a verdict for defendant, and plaintiff excepts. Exceptions overruled.

Jas. E. Cotter, B. R. Doody, and Conrad Reno, for plaintiff.
Choate, Hall & Stewart, for defendant.

BRALEY, J. If the version of the accident given by the defendant's witnesses was accepted, the plaintiff observing that he was being carried beyond his destination, after being warned of the danger, jumped from the car while it was moving. Although it was uncontroverted that at the time he was riding on the front platform, his evidence in substance showed that after informing the motorman where he wished to get off, and who indicated his assent, later noticing that the car had passed beyond this point, he again spoke, and the brake was applied, when, as the plaintiff was preparing to alight, the brake being released, the car suddenly moved forward and by its momentum caused his grasp on the hand rail to be loosened, and ejected him into the street. Upon this conflicting evidence the jury could have found that, with the knowledge of the motorman, a passenger was preparing to terminate the contract of carriage in the ordinary way, and for this purpose as the car was being brought to a stop, without again observing the plaintiff's position, he negligently released the brake. It also could have been found that the plaintiff rode on the front platform because the car was somewhat crowded, and discovering that he would have to stand preferred "to stand outside." By reason of these divergent narratives if nothing further appeared, it is plain that the usual issues of the defendant's negligence, and of the due care of the plaintiff were matters of fact for the determination of the jury under

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appropriate instructions. *Corlin v. West End St. Ry. Co.*, 154 Mass. 197, 27 N. E. 1000; *Sweetland v. Lynn & Boston St. Ry. Co.*, 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783; *La-pointe v. Middlesex St. Ry. Co.*, 144 Mass. 18, 10 N. E. 497; *Cummings v. Worcester, Leicester & Spencer St. Ry. Co.*, 166 Mass. 220, 44 N. E. 126; *Block v. Worcester*, 186 Mass. 526, 527, 72 N. E. 77.

It, however, has been settled, that where a common carrier of passengers operating a railway by whatever motive power, establishes a rule either prohibiting such use, or stating that if passengers while in transit chose to ride on the front platform, they do so at their own risk, a passenger who with knowledge of the first rule intentionally violates it, or of the second rule and chooses to take the risk, and is thereby injured cannot recover. *Sweetland v. Lynn & Boston St. Ry. Co.*, *ubi supra*; *Wills v. Lynn & Boston R. R. Co.*, 129 Mass. 351; *Burns v. Boston Elevated Ry. Co.*, 183 Mass. 96, 66 N. E. 418.

There was no direct proof offered by the defendant that it made and promulgated a general rule of the second class, but such a regulation may be proved from the testimony of the passenger himself. *Burns v. Boston Elevated Ry. Co.*, *ubi supra*. In cross-examination, after stating that he had frequently ridden on the cars, the plaintiff further said that he had given little, if any, attention to a sign displayed on the window, and when asked if he knew "there was one there about riding on the front platform," answered that he did not know if there was such a notice. This answer was followed by a general question in these words, "But you had noticed on the front platform, that people who rode on the front platform, or got on and off on the front platform, did so at their own risk?" "You had noticed that on the cars?" to which the plaintiff replied, "Yes, sir, I had." If the plaintiff denied having observed a similar notice on the window of this car he also admitted knowledge of the existence of this rule. The object of the notice which embodied the rule, was to warn passengers of the danger, and also to charge them alone with the consequences which might follow, if they chose to disregard it. But if from previous observation such warning and consequent assumption of liability were known to the plaintiff, it was unnecessary for the defendant to go further, and prove that he also had seen the notice on the particular car where he was riding, for such knowledge, followed by his choice of position, would operate to bar his recovery. *Cheney v. Boston & Maine R. R.*, 11 Metc. 121, 123, 45 Am. Dec. 190; *O'Neill v. Lynn & Boston R. R. Co.*, 155 Mass. 371, 29 N. E. 630.

From the undisputed evidence of the motorman it could be found not only that the gates were open, but that it was a common occurrence for passengers regularly to ride on the front platform without objection, unless there were too many on that end, a condition not appearing in the present case, and the plaintiff claims that the question whether the rule had not been waived should have been submitted to the jury. It is undoubtedly

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true that a general usage, or course of business, may be proved by one witness. *Jones v. Hoey*, 128 Mass. 585. But in permitting its cars to be regularly operated by inviting passengers to ride on the front platform, even if open for their accommodation, the defendant was not acting inconsistently with its right to insist on the rule, as the choice of riding there or inside the car was still left optional even upon the plaintiff's evidence. The distinction between prohibiting such use of the platform, and then waiving the prohibition by regularly opening it for the accommodation of passengers, or permitting them to ride there at their own risk is obvious. In the first instance the restriction is absolute until abandoned, and the abandonment may be implied from the conduct of the carrier; while in the last the platform is left unreservedly open, yet the opportunity of carriage thus afforded is furnished only upon condition that the passenger occupying this part of the car takes the chance of injury that may be caused by reason of the exposed position. *Sweetland v. Lynn & Boston R. R. Co.*, *ubi supra*; *Burns v. Boston Elevated Ry. Co.*, *ubi supra*.

A question of evidence remains. Admissions of liability made by a servant who is not a general agent, or while not engaged in the performance of his duty are inadmissible to bind the master, but the testimony, that the motorman immediately after the accident stated that he was under the impression the plaintiff had previously got off was admissible, because it tended not only to contradict him as a witness, but to support the plaintiff's claim of being thrown off by the sudden jerk of the car, which was due to the negligence of the motorman. *Bachant v. Boston & Maine R. R.*, 187 Mass. 392, 396, 73 N. E. 642, 105 Am. St. Rep. 408; *Robinson v. Old Colony St. Ry. Co.*, 189 Mass. 594, 76 N. E. 190. But the plaintiff having failed to show the violation of any duty owed to him by the defendant its erroneous exclusion becomes immaterial.

Exceptions overruled.

HENDERSON v. LOUISVILLE & N. R. Co.
In re LOUISVILLE & N. R. Co.

(Supreme Court of Louisiana, April 9, 1906. Rehearing Denied June 4, 1906.)

[41 So. Rep. 252.]

Carriers—Bill of Lading—Transfer—Rights of Parties.*—A railroad company is not bound by a bill of lading given by its agent for sugar not received or delivered for transportation even when the instrument has been indorsed and transferred to a third person for value in the usual course of business.

Same.—This rule of commercial law was not abrogated or modified by Act No. 150, p. 193, of 1868, making it a felony for any person to

*For the authorities in this series on the question whether a bill of lading is conclusive evidence of the truth of the statements embraced therein, see foot-notes appended to *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787.

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sign or issue false receipts or bills of lading for property not actually received or delivered.

Same—Negotiability.†—Act No. 150, p. 193, of 1868, makes negotiable, only receipts and bills of lading issued in accordance with its provisions for property actually received for storage, transportation, or other purposes.

(Syllabus by the Court.)

Action by T. J. Henderson against the Louisville & Nashville Railroad Company. Judgment for plaintiff was affirmed by the Court of Appeal, and defendants applied for certiorari or writ of review. Judgment reversed, and suit dismissed.

Denegre & Blair and *Victor Levy*, for applicant.

McCloskey & Benedict, for respondents.

LAND, J. Plaintiff as the holder and owner of an "order notify" bill of lading issued by the agent of defendant company at the city of New Orleans, and acknowledging the receipt of 100 barrels of sugar from Drew & Harvey, to be transported to the city of Chicago, sued the defendant for the value of the sugar on the ground of refusal to deliver the same on demand and offer to surrender the bill of lading.

Defendant in its answer, after pleading the general issue, admitted that the bill of lading was signed by its agent and delivered to Drews & Harvey, but specially denied that the sugar or any part thereof was delivered to or received by the defendant company and that the agent had any authority to sign and issue the alleged instrument.

For further answer, and in the alternative, the defendant company charged that plaintiff had been guilty of laches in not forwarding the bill of lading and demanding delivery of the sugar at the point of destination, and in not communicating with Sprague, Warner & Co. of Chicago, who were to be notified, and in not making any inquiry of or giving any information to defendant.

The defendant averred that on account of such laches it was prevented from protecting itself against loss by timely recourse against the firm of Drews & Harvey, which was in good standing when the bill of lading was issued, but became insolvent before plaintiff communicated knowledge of the facts to defendant.

The district court rendered judgment in favor of plaintiff, and the defendant appealed to the Court of Appeal for the parish of Orleans, which affirmed the judgment in an elaborate and well-considered opinion.

The Court of Appeal found with the district court that the plaintiff was an innocent and bona fide transferee for value of the bill of lading, and proceeded to discuss and decide the case

†For the authorities in this series on the subjects of the negotiability and transfer of bills of lading, see foot-notes appended to *Vaughn v. New York, etc., R. Co.* (R. I.), 17 R. R. R. 94, 40 Am. & Eng. R. Cas., N. S., 94; foot-note appended to *General Elec. Co. v. Southern Ry.* (S. Car.), 17 R. R. R. 76, 40 Am. & Eng. R. Cas., N. S., 76.

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on the assumption that Drews & Harvey made no such shipment as was recited in the bill of lading, and consequently that the sugar was not delivered to the defendant company.

The district court ruled that the defendant was estopped by the bill of lading to deny the receipt of the 100 barrels of sugar, and excluded specific evidence on the subject, but nondelivery to the carrier is inferentially shown by the evidence, and it may be said that plaintiff's suit is based on that theory.

It is admitted in the opinion of the Court of Appeal that the English rule is that, even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the recital of the bill of lading issued by its agent to show that the goods therein described were not in fact received for transportation. It is further admitted in the opinion that this is also the settled doctrine of the federal courts.

The Court of Appeal, however, cites decisions in some of the states to the effect that the carrier is estopped to deny the delivery of the goods to the prejudice of third persons, who have in good faith in the ordinary course of business acted upon the representations of the agent.

The Court of Appeal held that this controverted question was set at rest in the state of Louisiana by Act. No. 150, p. 193, of 1868; and that the case of *Hunt & Macauley v. Railroad Co.*, 29 La. Ann. 446, decided by a divided court is not an authoritative construction of the statute.

In their very able and interesting brief, counsel for defendant contend that the English rule has been followed in all the courts of the United States, federal and state, except those of New York, Kansas, and Nebraska, and that this rule was not abrogated or modified by Act No. 150, p. 193, of 1868, making bills of lading negotiable, as was decided by the Supreme Court of this state in the *Hunt & Macauley Case*, *supra*.

The English doctrine, as set forth in *Grant v. Norway*, 2 Eng. L. & E. 337, and in *Buckingham v. Freeman*, 18 How. (U. S.) 188, 15 L. Ed. 341, was expressly approved by our predecessors in *Fellows v. Str. Powell*, 16 La. Ann. 316, 79 Am. Dec. 581. The same doctrine had been previously recognized in *Fearn Putnam & Co. v. Richardson*, 12 La. Ann. 752.

The question to be solved is whether this rule is inconsistent with the provisions of Act. No. 150, p. 193, of 1868. In the *Hunt v. Macauley Case*, two of the justices were of opinion that this rule of commercial law was not affected by the provisions of said act. One of the justices concurred in the decree, on the ground that the plaintiff was not a third party to the bill of lading. The two dissenting justices were of opinion that it was the intent of the statute "to protect both the carriers and the public, the former by punishing any persons in their employ for issuing false bills of lading or receipts, and the latter by putting such bills or receipts upon the same footing as commercial paper and protecting the holder in good faith with all

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the privileges and immunities given to bills of exchange and promissory notes.”

It is apparent that there was an even balance of opinion on the question before the court, and that therefore the point was not decided.

The object of the act of 1868 as stated in the title, was “to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by cotton presses, wharfingers, and others.”

The first section provides that no cotton compress, wharfinger, or other person shall issue any receipt or other voucher for goods, wares, etc., to any person purporting to be the owner or holder thereof, unless such goods, wares, etc., shall have been actually received, and shall be in store or on the premises, or under his control at the time of the issuing of the receipt.

The second section provides that no cotton compress, wharfinger, or other person shall issue any receipt or other voucher upon any goods, wares, etc., to any person for money loaned or other indebtedness, unless such goods, wares, etc., shall be at the time in store or upon the premises and under his control.

The third section prescribes that duplicate receipts shall not be issued while the originals are outstanding without writing across the face of the same the word “Duplicate.”

The fourth section prohibits any cotton press, wharfinger, or other person from selling, incumbering, shipping, transferring, or removing any goods, wares, etc., for which a receipt shall be given, without the written assent of the holder of the receipt.

Section 5 of the act reads as follows:

“That no master, owner, or agent of any boat or vessel of any description, forwarder, or officer or agent of any railroad, transfer or transportation company, or other person, shall sign or give any bill of lading, receipt or other voucher or document for any merchandise or property by which it shall appear that such merchandise has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped and put on board and shall be at the time actually on board, or delivered to such boat, vessel, car or other vehicle, to be carried or conveyed as expressed in said bill of lading, receipt, voucher or other document.”

Section 7 provides that any cotton press, wharfinger, forwarder, or other person who shall violate any of the provisions of the act shall be deemed guilty of a criminal offense and on conviction shall be fined in any sum not exceeding \$5,000 or imprisoned in the State Penitentiary not exceeding five years or both. This section further provides as follows:

“And all and every person or persons aggrieved by the violation of any of the provisions of this act may have and maintain an action at law against the person or persons, corporation or corporations, violating any of the provisions of this act to recover all damages, immediate or consequential, which he or they may have sustained by reason of any such violation as aforesaid,

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before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not."

Before referring to the sections relative to the negotiability of receipts and bills of lading, it is to be noted that the act makes it a criminal offense for any officer or agent of a railroad to sign or give any bill of lading for property not actually delivered for shipment.

It is to be further noted that the act gives to the party aggrieved a civil remedy by action for damages against the person or persons, whether convicted or not, violating any of its provisions.

It seems manifest that the criminal act of an agent or officer of a railroad in signing or issuing a false bill of lading cannot be considered within the scope of his employment or as binding on the principal.

The only civil remedy given by the statute is against the wrongdoer.

The act so far from abrogating or modifying the general rule that the agent has no authority in such cases, affirms and accentuates the rule by making the act of the agent a criminal offense, thus placing such act beyond the pale of legal recognition as done under an implied authority resulting from the nature of the employment.

The contention that the act makes a false bill of lading negotiable, and therefore binding on the railroad when in the hands of a third innocent holder, is contrary to the express intent of the statute, which is to prevent the issue of false receipts and bills of lading.

The lawmaker certainly did not intend to denounce such issue as a felony and at the same time to encourage the violation of the statute by making false bills of lading negotiable. A careful reading of the provisions of the statute will demonstrate that the receipts and bills of lading intended to be made negotiable are such as are issued for property actually delivered or received.

Section 9 of the Act reads as follows:

"That all receipts, bills of lading, vouchers or other documents issued by any cotton press, wharfinger, forwarder or other person, boat, vessel, railroad, transportation or transfer company, as by this act provided, shall be negotiable by indorsement in blank, or by special indorsement, in the same manner and the same extent as bills of exchange, and promissory notes now are."

Surely, the act does not provide for the issue of false receipts and bills of lading. Section 6 of the same statute provides that receipts for goods, wares, etc., "stored or deposited with any cotton press, wharfinger, or other person or any bill of lading given by any forwarder, boat, vessel, railroad, transportation or transfer company may be transferred by indorsement," etc., but that "no property shall be delivered except on

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surrender and cancellation of said original receipt or bill of lading."

The statute places receipts and bills of lading on the same plane; and section 8 specially provides that all the provisions of the act apply to bills of lading.

It is impossible to conclude that the lawmaker intended to make false bills of lading negotiable, and at the same time to deny negotiability to false receipts.

We concur in the conclusion reached by Justice Marr (Manning, Chief Justice, concurring) in the *Hunt & Macauley Case*, that:

"When section 9 makes bills of lading negotiable, in the same manner and to the same extent as bills of exchange, and promissory notes are, it means genuine bills of lading."

Any other construction would make the carrier bound for the consequences of a criminal act committed by a person not authorized to represent him.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal and the judgment of the district court herein rendered be annulled, avoided, and reversed; and it is now ordered and decreed that plaintiff's demand be rejected and his suit be dismissed; and it is further ordered that plaintiff pay all costs of this litigation.

NICHOLLS, J., absent.

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(Supreme Court of Ohio, May 22, 1906.)

[78 N. E. Rep. 376.]

Carriers—Street Cars—Wrong Transfer Ticket—Ejection of Passenger.*—A passenger on a street railway, who has paid fare and is entitled to ride over another line belonging to the same company, and who, having asked for a transfer ticket over such other line, is given, by mistake of the conductor, a transfer which is not good over such other line, may, nevertheless, if he has exercised such care about the receiving and making use of the transfer ticket as persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, lawfully insist upon being carried over such other line without further payment of fare; and if such passenger, without fault on his part, is ejected from a car for refusing to pay fare other

*For the authorities in this series on the subject of street railway transfers, see foot-notes appended to *Virginia P. & P. Co. v. Commonwealth* (Va.), 18 R. R. R. 135, 41 Am. & Eng. R. Cas., N. S., 135; *Reynolds v. Pacific Elec. Ry. Co.* (Cal.), 17 R. R. R. 658, 40 Am. & Eng. R. Cas., N. S., 658.

For the authorities in this series on the subject of the damages recoverable for the ejection of a passenger, see foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; foot-notes appended to *Elliott v. Southern Pac. Co.* (Cal.), 18 R. R. R. 52, 41 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *Georgia Ry. & Elec. Co. v. Baker* (Ga.), 13 R. R. R. 259, 36 Am. & Eng. R. Cas., N. S., 259 (mental suffering of ejected passenger).

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than by such transfer ticket, he may recover damages for the tort, and cannot be restricted to damages for breach of the contract to carry him.

Same—Evidence.—A failure by the plaintiff to make a statement or explanation before he was put off the car, would not of itself defeat his right to recover; but such fact is admissible in evidence as part of the *res gestæ* as bearing upon the question of the plaintiff's good faith in accepting and using the erroneous transfer, and as affecting the amount of damages.

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Action by one Conner against the Cleveland City Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Squire, Sanders & Dempsey, for plaintiff in error.

Smith, Beardsley & Morgan, for defendant in error.

DAVIS, J. The defendant in error was a passenger on a Franklin Avenue street car, which belonged to the plaintiff in error. Just before arriving at the corner of Pearl and Detroit streets he asked the conductor for a transfer to the St. Clair Street line, also owned by plaintiff in error, and received the same just as he was leaving the Franklin Avenue car at the corner of Pearl and Detroit streets. It was 7:30 o'clock in the evening in the month of December, 1900. By mistake the conductor gave to the defendant in error a transfer to the Woodland Avenue line, also owned by plaintiff in error, instead of a transfer to the St. Clair Street line. The defendant in error got on the St. Clair Street car at the corner of Pearl and Detroit streets, as he had intended, and he claims that he did not know of the mistake in the transfer until the conductor on the St. Clair Street car refused to accept the transfer, and demanded payment of the fare, which the defendant in error refused to make. He was forcibly ejected from the car, and brought this action to recover damages for the refusal to carry him, and for ejecting him. Upon the trial of the case in the court of common pleas, the jury was instructed that if it should be found that the defendant did exercise the care in giving the transfer that it should have exercised under all the circumstances, and that the plaintiff did exercise the care that he should have exercised in receiving the transfer, and that the defendant had not been wrong in any other respect, then the verdict should be for five cents and no more; because, as was said to the jury, the only damage done to a passenger by giving him an improper transfer is to compel him to pay five cents for his subsequent transit and therefore that is the measure of his damage. The jury were also specifically instructed that when the attention of this passenger was called to the fact that the transfer did not entitle him to ride on the St. Clair Street line, it was his duty to pay for his transit; and that if he refused to pay, the company had a right to remove him from the car, using no more force than was necessary. The

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verdict was for the defendant company. Judgment was entered upon the verdict, which judgment was reversed by the circuit court for errors in charging the jury and in refusing to charge as requested by plaintiff. This proceeding in error is prosecuted to reverse the judgment of the circuit court, and to affirm the judgment of the court of common pleas.

It appears to have been the opinion of the court of common pleas that, because the conductor on the St. Clair Street line was strictly within the line of his duty as between him and his employer, therefore the plaintiff has no cause of action against the employer for putting him off the car. The premise is palpably correct; and the conclusion is just as clearly incorrect. This is not a controversy between the master and the servant; nor between the passenger and the conductor; nor yet between the carrier and the passenger solely in regard to the act of the carrier's servants in ejecting the passenger from the car; but it is an action against the carrier for the wrongful and negligent act of giving the transfer, as the proximate cause of the resulting injury, which was the refusal to carry the plaintiff as he had the right to be carried, and putting him off the car. Since the complaint is against the company itself, it can avail the defendant nothing to show that one of its servants obeyed a reasonable rule of the defendant in putting the plaintiff off of the defendant's car, when the defendant itself, through the agency of another servant, created the conditions which caused him to be put off. "Qui facit per alium facit per se." It is as though a single individual had first agreed to carry the plaintiff by the St. Clair Street line and by mistake had given a ticket over the Woodland Avenue line, and then, when he came to take up the ticket, taking advantage of his own mistake or wrong, refused to honor it, and forcibly ejected the plaintiff. The defendant, plaintiff in error here, is the actor throughout this transaction; although it acted through different agencies in giving and refusing to accept the transfer, and ejecting the plaintiff. It is, therefore, not sound reasoning to argue that this company is not liable in tort for refusal to carry the plaintiff and ejecting him from the car, upon the theory that the conductor, who removed the passenger from the car under a rule of the company, is personally without blame in the matter. The common pleas court therefore erred when it instructed the jury that when the plaintiff was informed that the transfer did not entitle him to ride on that car, it was his duty to pay fare, and if he did not do so, the company had the right to remove him; and that if the company was guilty of no other wrong than giving the wrong transfer the plaintiff could recover five cents, the fare for one trip, and no more. It would be unprofitable to review and discuss irreconcilable decisions in other jurisdictions. In every essential feature this case is controlled by the reasoning in *P., C., C. & St. L. Ry. Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. 712, 60 Am. St. Rep. 706, which we see no reason to overrule or qualify. It is conceded, however, that in order to recover, the

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plaintiff must be without fault in receiving and making use of the erroneous transfer; and the court of common pleas very properly instructed the jury in effect that the plaintiff in receiving, examining and using the transfer, must exercise such care as ordinarily prudent persons are accustomed to exercise concerning that matter under the same or similar circumstances. In *Railway Co. v. Reynolds*, *supra*, it appeared in an agreed statement of facts that the plaintiff was without fault in getting on the wrong train; but in this case, in the absence of the evidence, we cannot even conjecture what the jury might have found upon the issue, if the court had not practically directed a verdict for the defendant upon the theory which we have considered.

There is a degree of insistence in the argument for the plaintiff in error, that the record discloses a failure on the part of the plaintiff below, to make a statement or explanation of the facts to the conductor of the St. Clair Street car; and that the plaintiff was thereby precluded from the right to recover. The bill of exceptions does not bring before us the evidence which was adduced on the trial; and for that reason we cannot determine whether the defendant in error, plaintiff below, did or did not make such a statement. Whether or not the making of such a statement is a necessary ingredient of the plaintiff's right to recover for the tort, or whether or not the failure to make such a statement would constitute a complete defense to the action, are questions which are not without difficulty; but with the best consideration which we have been able to give the subject, we have not discovered any substantial reason, nor has any been stated to us, for adopting the affirmative proposition involved in either question. We can conceive, however, that the failure by the passenger to explain how he came into possession of the transfer, and that he was without fault in getting on the car without a proper transfer, might under some circumstances, very much mitigate the damages; and we can conceive a condition of facts under which the making of such an explanation by the passenger would even tend to enhance the damages. That is as far as we feel inclined to go; and therefore the failure to make such a statement or explanation, if there was any such failure, would not of itself justify a reversal of this judgment.

The judgment is affirmed.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and SPEAR, JJ., concur.

INDIANA UNION TRACTION CO. *v.* JACOBS.

(Supreme Court of Indiana, June 27, 1906.)

[78 N. E. Rep. 325.]

Carriers—Injury to Passenger—Pleading—Complaint.*—In an action against a street railroad for injuries to a passenger, the complaint alleged that defendant negligently and carelessly failed to provide a platform or safe and convenient place and means of leaving the car at the point where it was stopped for plaintiff to alight, and that it negligently failed to stop the car at the usual place, but ran it to a point where there was a distance of about two or three feet from the step to the ground, negligently informed plaintiff when the car stopped that she had arrived at her destination, and failed to assist her in alighting. Held, that in respect to the failure to provide a platform in the street, and in running the car beyond the usual place, the complaint showed no cause of action, but the remaining allegations taken together constituted a showing of negligence.

Same—Question for Jury—Contributory Negligence.—In an action for injuries to a passenger on alighting from a car, evidence considered and held, that the question of contributory negligence was for the jury.

Damages—Pleading—Evidence—Special Damages.—In an action for personal injuries, aggravation of an existing condition is not special damages, and need not be specially pleaded in order to admit of evidence thereof.

Appeal—Presentation of Question on Trial—Sufficiency of Evidence.—Where testimony was received in response to a hypothetical question, on undertaking of counsel to follow up the question by proof of facts sustaining the hypothesis, a question as to whether such facts had been shown could only be reviewed on appeal by saving the question by a motion, after plaintiff had rested her case, to strike out the answer.

Evidence—Declarations—Physical Condition.—In an action for personal injuries, plaintiff's attending physician testified that on the night of the accident he was called, and, being asked to describe plaintiff's condition, stated that he found her in bed, and that she told him that she had an injured ankle. Held, that it was proper to overrule a motion to strike the answer as to what plaintiff said, as the declaration was evidently but introductory to the witness' treatment of the case and made to one competent to judge as to its truth or falsity.

Carriers—Injury to Passenger—Evidence—Sufficiency.—In an action against a street railroad company for injuries to a passenger, a witness for defendant testified that he was employed by defendant and in charge of the car in question. Held, that the jury was warranted in finding that the car was operated by defendant.

Appeal—Review—Invited Error.—An appellant cannot complain of an erroneous instruction, where the error was invited by an instruction tendered by him.

Trial—Instructions—Ignoring Issues.—In an action for injuries, the court instructed, after referring to the issues, that, if plaintiff had proved the material allegations of the complaint, "then she is entitled to recover." The jury were charged in other instructions that contributory negligence would defeat a recovery, and that, while the

*For the authorities in this series on the subject of the duties due an alighting passenger, see foot-notes appended to *O'Dea v. Michigan Cent. R. Co.* (Mich.), 19 R. R. R. 53, 42 Am. & Eng. R. Cas., N. S., 53; *Chesapeake & O. Ry. v. Harris* (Va.), 18 R. R. R. 139, 41 Am. & Eng. R. Cas., N. S., 139; foot-notes appended to *Behen v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 103, 41 Am. & Eng. R. Cas., N. S., 103; *Barringer v. St. Louis, etc., Ry. Co.* (Ark.), 18 R. R. R. 112, 41 Am. & Eng. R. Cas. N. S., 112.

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burden of proving it was on defendant, it might be made out by plaintiff's evidence. And other instructions which were framed on lines not essentially different from the first instruction were qualified by the statement that plaintiff was entitled to recover, unless contributory negligence was shown by a preponderance of the evidence. Held, that the first instruction was not erroneous for ignoring contributory negligence, as the jury could not have been misled.

Carriers—Injury to Passenger—Contributory Negligence—Leaving Conveyance.†—A passenger on a street car has a right, when the car stops for him to alight, to assume that the car has been stopped at a place where by the exercise of due care he may alight in safety.

Appeal from Circuit Court, Hamilton County; Ira W. Christian, Judge.

Action by Charlotte Jacobs against the Indiana Union Traction Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

Jas. A. Van Osdol, W. A. Kittinger, and Kane & Kane, for appellant.

Gavin & Davis and Gentry & Cloe, for appellee.

GILLET, J. Suit by appellee against appellant for injuries received by her while attempting to alight from appellant's interurban car, in a public street in the town of Arcadia. Appellant was defeated below, and it assigns as error the overruling of its demurrer to the complaint, and the overruling of its motion for a new trial.

The charges of negligence in said complaint are as follows: "That said defendant negligently and carelessly failed to provide a platform or other safe and convenient place and means of entering and leaving said car, at the point where said car was stopped by said defendant, for said plaintiff to alight from said car, and that said defendant negligently and carelessly failed to stop said car at the usual place provided by said defendant at said town of Arcadia for passengers to enter upon and leave said cars, and negligently and carelessly ran said car beyond said usual place for stopping the same, for receiving and discharging passengers, to a point where there was a distance, namely, 3 or 3½ feet from the lowest step on said car to the ground, and where said ground was uneven and unfit as a place for passengers to alight from said car, and negligently and carelessly informed said plaintiff at the point said car was stopped that she had arrived at her destination where she was to leave the car at said point, and said defendant negligently and carelessly failed to assist her in alighting from said car." It is alleged that it was dark at the time, that plaintiff supposed that the car was standing at the usual place for discharging passengers, that she did not

†For the authorities in this series on the subject of the right of a passenger to rely on the assumption that the carrier has performed or will perform its duties to him, see foot-notes appended to *Chesapeake & O. Ry. v. Harris* (Va.), 18 R. R. R. 139, 41 Am. & Eng. R. Cas., N. S., 139.

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know that the distance was so great, and that she believed that she could safely alight. In respect to the failure to provide a platform in the street, and in running the car beyond the usual place, the complaint fails to disclose a cause of action, but the remaining allegations, taken together, make a sufficient showing of negligence. It is not alleged that the defendant caused the street to be defective, and it is urged that the complaint is insufficient because of the failure to aver knowledge, actual or constructive, on the part of appellant, of said condition. If this were a suit against the municipality, the case being one of omission, the objection would be well taken, as knowledge in such a case is a constituent element in the duty owing. But in a case like this, where the facts disclose a direct and immediate duty to carry safely, growing out of the relation of carrier and passenger, we are of opinion that it is permissible to charge negligence in general terms. *Turner v. City of Indianapolis*, 96 Ind. 51; *Town of Spiceland v. Alier*, 98 Ind. 467; *Cleveland, etc., R. Co. v. Wynant*, 100 Ind. 160; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Wabash R. Co. v. De Hart*, 32 Ind. App. 62, 65 N. E. 192; note to *King v. Oregon Short Line R. Co. (Idaho)* 59 L. R. A. 209.

It is contended by counsel for appellant that appellee was guilty of contributory negligence. It appears from the evidence that on the 23d day of March, 1904, appellee took passage on one of appellant's interurban cars for her home in the town of Arcadia. The car was a limited one, and it arrived at Arcadia as it was growing dark. The conductor announced the town as the car approached appellee's destination. The car did not stop at the intersection of Main street, where appellee might have alighted in safety, but it stopped a few feet beyond. At this point appellant had made a considerable excavation, for the purpose of putting gravel under its ties, with the result that the roadway was in such a condition that for a passenger to alight at said point he would be required to step down from 30 to 36 inches. Appellee resided on the street occupied by appellant's tracks, about one block from Main street. She admitted that she knew that the street had been torn up for some months by the building of the railroad, but she testified that she had not been near the point where the car stopped in months, except as she went away that morning, and that she had not paid any attention to conditions there. She further testified that she noticed that morning that the roadway was uneven, but that she did not know that the railroad had not been completed, or that the track had not been ballasted. She was 58 years of age, and her eyesight, while as good as that of most persons of her age, had failed somewhat, so that she had to wear glasses, but she was still able to pursue her vocation, which was that of a seamstress. Her left foot was not as supple as the other, owing, as she testified, to the fact that the toes of her left foot had not fully developed, and this caused her to walk with a perceptible limp. There was no one present to assist her in alighting, and in stepping down,

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with her left foot first, she lost her balance and fell to the ground, owing to the fact that she misjudged the distance. There were lights burning dimly in the car, and as appellee came out on the platform it seemed dark to her. She testified: "I looked, and the distance seemed great to me. It appeared like it might be a foot and a half, perhaps two feet. I am not very accurate in determining distances, but I thought by being careful—I was not in a hurry about getting off—by being careful that I could get down without any trouble. * * * I looked and hesitated. Looked up and down the track to see if there was any one to assist me. I looked again, and it seemed nearer to me than when I first looked down. The ground seemed to be closer when I looked again." She further testified that she did not hurry, and that she thought by being careful she could get down without any trouble. We have no doubt, in the circumstances of this case, that the question whether appellee was guilty of contributory negligence was for the jury. It is unnecessary to enter a discussion of the subject, for the authorities settle the question. *Buehner Chair Co. v. Feulner*, 164 Ind. 368, 73 N. E. 816 and cases cited; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. Rep. 330. And see particularly *Town of Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230.

Appellant complains of a ruling of the court whereby appellee was permitted to show by her physician that if a woman who had been afflicted with rupture, but which had been cured, should receive a fall, in alighting from a street car, which seriously injured her ankle and strained her back, and the injury was followed by pains in the back, such injury would have a tendency to aggravate the old malady with which she had been afflicted. While there is no averment in the complaint of an aggravation of a former malady, the allegations of the complaint, which are very comprehensive, are quite sufficient to admit evidence of such fact. Aggravation of an existing condition is not regarded, at least in this state, as special damages, and it is clear that, under the comprehensive allegations of injury which the complaint in this case contains, the proof was within the issues. *Ohio, etc., R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Morgan v. Kendall*, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58, 36 N. E. 529. It is urged that, at the time the hypothetical question was asked, the existence of the facts sustaining the hypothesis had not been shown. The evidence was received on the undertaking of appellee's counsel to follow up the question by proof of the facts. It appears to us that subsequently the facts were all testified to by appellee, but in any event the question could only have been saved by a motion, made after she had rested her case, to strike out the answer.

Appellant is in error in the assertion that there was no proof of a stiffening of appellee's fingers as a result of her grasp on the handrail breaking, and therefore the objection that these facts, which formed the basis of a further hypothetical question, were not proved, is not well taken.

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Appellee's attending physician testified that on the night in question he attended upon her professionally. Being asked to describe her condition, he answered: "I found her in bed. She told me that she had an injured limb, an injured ankle." Appellant moved to strike out the witness' answer as to what appellee said, and the overruling of this motion was assigned as a ground for a new trial. The declaration was evidently but introductory to the witness' treatment of the case, and it was made to one who was competent to judge whether it was false. Such statements are not regarded by the courts as resting on the plane of hearsay. *Town of Elkhart v. Ritter*, 66 Ind. 136; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252; *Stewart v. Everts*, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17; *Chapin v. Marlborough*, 9 Gray (Mass.), 244, 69 Am. Dec. 281; *Lush v. McDaniel*, 13 Ired. (N. C.) 485, 57 Am. Dec. 566; *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821.

A number of minor points are made concerning rulings in appellee's favor relative to the admission of testimony offered by her. Without extending this opinion to discuss the rulings complained of in detail, we have to say that we are of opinion that appellant has no serious ground of complaint with reference to any of these, and that in no instance is there shown to be a ground of reversal growing out of a ruling on the evidence.

It is contended that it is not shown that the car was operated by appellant, the Indiana Union Traction Company. There is no evidence to the contrary, and, as the company was defending, we are of opinion that the jury was justified in concluding that that fact existed upon very slight implications. There was, at least, some evidence that appellant owned said road and was operating cars thereon. It appeared from the evidence of appellee that she made the trip from Tipton to Arcadia, arriving at the latter place about 7 o'clock in the evening, and a witness for appellant testified that he was in the "employment of the defendant, the Indiana Union Traction Company, on the 23d of March, 1904," and that he was "in charge of the defendant's car that made the run from Tipton, arriving at Arcadia about 7 o'clock in the evening." Upon this state of the evidence we are of opinion that the jury, in the absence of anything to create the slightest implication to the contrary, was justified in finding that the car was operated by appellant, as charged in the complaint.

Complaint is made that the court instructed the jury that the plaintiff was not required to prove all of the acts of negligence alleged, but that it was sufficient if she proved any act of negligence charged in her complaint as the proximate cause of her injuries. The objection which is urged to this instruction is that in some particulars the acts complained of by appellee did not constitute negligence. It appears to us, however, that by instruction No. 7, tendered by appellant and given by the court, the error was invited. *Elliott, App. Pro.* § 627; *Ewbank's Manual*, § 255.

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A reversal is sought because the court, in an instruction to the jury, after referring to the issues, stated that, "if the plaintiff has so proved the material allegations of her complaint, then she is entitled to recover such damages as will compensate her for the injuries." The objection urged to this instruction is that it ignores the element of contributory negligence. The jury was charged with great distinctness that contributory negligence would defeat a recovery, and that, while the burden of proving such negligence was on the defendant, yet that such defense might be made out by the evidence of the plaintiff and her witnesses with the same effect as if made by the witnesses of the defendant. Five instructions were given which referred to the subject of contributory negligence, and four were given relative to the subject of ordinary care being exercised by the plaintiff. The sixth, seventh, and ninth instructions given by the court, which were framed on lines not essentially different from the instruction complained of, were qualified by the statement that the plaintiff, upon proving the facts referred to in such instructions, was entitled to recover, unless the defendant had proved by a preponderance of evidence some act of negligence on her part contributing to her injuries. Upon a review of the instructions on the subject of contributory negligence, we are impressed with the view that the jury was overinstructed upon that subject, and it is our conclusion that the jury could not have been misled by said instruction. It was really correct, as far as it went, as it really but amounted to a statement that "then" that is, upon proving the facts alleged in her complaint, she was entitled to a recovery as the evidence then stood. The qualifying clause ought in strictness to have been added immediately thereafter, so as to guard against the possibility that the jury would misapprehend the effect of the instruction; but, presuming that the jury exercised common sense, we cannot indulge in the supposition that the jurors were not mindful of the abundant instructions which they received on the subject of contributory negligence, or that they failed to perceive that in three other instances the qualifying clause was added. A cause ought not to be reversed merely because an instruction is obnoxious to verbal criticism. The test question in every case is: Was the jury misled? *Cleveland, etc., R. Co. v. Miller* (Ind. Sup.) 74 N. E. 509. In the circumstances of this case, we are of opinion that the giving of said instruction did not constitute error.

Negligence and contributory negligence, under a particular state of facts, may be a question for the courts, and, as an abstract proposition, it cannot be affirmed that, because the court instructs on that subject, its action is erroneous. Appellant's counsel have failed to point out, either in their statement of points and authorities or in their argument, wherein the court erred in instructing upon these subjects. It does not necessarily follow that, by the omission of some fact in an instruction involving a hypothesis relative to negligence, the instruction becomes misleading. Wherein the jury might have been misled in

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this particular has not been indicated. Appellant has no cause of complaint that the court instructed that, if the plaintiff was acting in a careful and prudent manner, she was not guilty of contributory negligence. Such an instruction is correct as far as it goes. One of the instructions, concerning which no specific objection has been pointed out, might seem, if standing alone, to overlook the subject of assumed risk (a different thing from contributory negligence, see *Indiana, etc., Oil Co. v. O'Brien*, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742): but, bearing in mind that the only testimony upon the subject of the appearances, as they presented themselves to appellee, fell from her own lips, and that her testimony strongly tended to negative the idea that she voluntarily cast herself upon a known and appreciated danger, there appears to be no substantial reason for supposing that the instruction was prejudicial.

The first part of appellant's instruction No. 12, which was refused, correctly stated that in certain circumstances the plaintiff had a right to remain on the car, but as the latter part of the instruction, which deals with the subject of assumed risk, was not limited to the facts stated in the first part of the instruction, we are of opinion that it was properly refused. Appellant's instruction No. 13 was not proper, as appellee had a right to assume, in the absence of notice to the contrary, that appellant had stopped its car at a place where, by the exercise of due care, she might alight in safety.

Judgment affirmed.

COUSINEAU *v.* MUSKEGON TRACTION & LIGHTING CO.

(Supreme Court of Michigan, July 23, 1906.)

[108 N. W. Rep. 720.]

Carriers—Injury to Passengers—Crowded Platform—Contributory Negligence.—It cannot be said, as matter of law, that one who had been taken by a street railway company to an amusement park conducted by it was guilty of contributory negligence in taking a position near the track in the front rank of the 7,000 people about the platform, after the close of the entertainment, waiting for cars, from which position she was pushed under a car.

Same—Negligence.—Whether a street railway company which conducted an amusement park, at which after the close of the entertainment one, who had taken her place in the front rank of the 7,000 persons waiting for cars, was pushed under a car, was guilty of negligence in not making adequate provision by way of railings, barriers, and policemen to furnish protection from the dangers incident to such a crowd, is a question for the jury.

Error to Circuit Court, Muskegon County; Fred J. Russell, Judge.

Action by Netiva Cousineau, by her next friend, Mary Cousineau, against the Muskegon Traction & Lighting Company. Judgment for defendant. Plaintiff brings error. Reversed, and new trial ordered.

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Argued before CARPENTER, C. J., and MCALVAY, BLAIR, HOOKER, and MOORE, JJ.

James E. Sullivan, for appellant.

Nims, Hoyt, Erwin, Sessions & Vanderwerp, for appellee.

MOORE, J. The plaintiff sued the defendant to recover for injuries done her by one of the cars of defendant company. The circuit judge was of the opinion she did not make a case and directed a verdict for defendant. Counsel for defendant is quite right in saying precedents on this subject are not plentiful, and it is difficult to find a case strictly parallel. Before taking up the legal questions, an understanding of the facts from the standpoint of the plaintiff is important. The defendant not only operates a line of street railway, but it is the owner of an amusement park containing a number of acres, upon the shore of Lake Michigan, with a grove, picnic tables, dancing pavilion, candy stand, theater, and a fine beach. It runs many of its cars into this park and around a loop. At one side of the loop there is a platform about 50 feet square. The planking of the platform at its beginning lay directly upon the sand, and gradually the surface is raised until it is about even with the running board of the cars. As a rule the cars stop opposite the platform, and the passengers step from the platform into the cars. There was no barrier along the track or around this platform, but it could be reached from all sides. Sometimes the cars coming from the city stop before reaching it. There was a sandy stretch of ground at the side of the track all the way up to the platform. On the 4th of July the plaintiff, a girl about 16 years old and a girl companion, took a car in the city and went out to the park. The cars were crowded when they went, and continued to be crowded all day long, and after 5 o'clock there never was a time when there were not more people to take the cars going to the city from the park than the motor car and trailer attached to it could carry. After the theater was over, and soon after 10 o'clock, the girls concluded to take a car back to the city, and repaired to near the place where the cars stopped for that purpose. It is the claim of plaintiff that between the dance pavilion, theater, and the street car track there were between 7,000 and 8,000 people, and when the plaintiff and her companion came to the platform there was such a crowd that it extended off the platform into the sand, and was so dense on the platform they could not get on it. The plaintiff stood about three feet west of the platform; her friend was nearer the platform, and both were about six feet from the track. The plaintiff with her right hand had hold of her friend's left arm, and the crowd was on all sides of her, except towards the street car tracks. The two girls took their places just after a street car train had left, and they remained standing until the next train came, about 10 or 15 minutes later, expecting to get on the next car if she and her companion could secure seats therein. She had paid her fare to the park in the morning on

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coming down, and expected to pay her fare on the car going back, as was usual. A train of two cars would carry about 160 people. The crowd was a good natured one; but every one apparently desired to get on the first car going away from the park. Plaintiff says she saw but one policeman and he was at the farther end of the platform. When the motor car and trailer appeared it is claimed the crowd made a rush for them before they stopped, though the motorman and conductor warned them not to get on until the cars stopped. No heed was paid to this warning by the crowd. The plaintiff and her companion were thrown down; the plaintiff going between the motor car and trailer, and receiving injuries for which this action is brought.

Two questions are presented: First. Was the company negligent in not making adequate provision by the way of railings, barriers, and policemen to protect the persons who had accepted the invitation to come to the amusement park, against the dangers incident to such a great crowd? And, second, was the plaintiff guilty of such contributory negligence that she cannot recover? We take up these propositions in the inverse order. We quote from brief of counsel for defendant: "One contention of the defendant is that when the plaintiff voluntarily joined the crowd near the platform, edging her way through it to the front ranks near the track, knowing the extent of the crowd, the facilities of the defendant to transport them, the open condition of the track, and the expected approach and frequent passage of cars thereon; she assumed all risks involved in the taking of such position. We here use the term 'assumed risk' in its broad and general sense, and not in its contractual sense, as applied in the law of master and servant. It is also insisted on defendant's part that such conduct of the plaintiff constituted contributory negligence precluding her recovery. * * * The plaintiff was not a stranger to the situation at the park. She knew what to expect there. She had lived in Muskegon all her life, and had visited the park very frequently. During the season she had been there once or twice a week. She was thoroughly familiar with the park and the conditions, including the occasional presence of large crowds; and, of course, knew of the absence of any railings or barrier around the platform and along the track. Plaintiff knew that the cars did not usually stop where she stood, but only opposite the platform. She knew the chances for getting aboard the cars were very remote, but says she and her companion were waiting to see whether there was any room for them. It was and is the claim of the defendant that, under the circumstances disclosed, the conduct of the plaintiff in making her way through the throng of people and taking a position in the front rank near the track, off the platform, in loose sand ankle deep, was negligence contributing to her injury." No authorities directly in point are cited in support of this proposition. It should be borne in mind that this amusement park was several miles from the homes of the people who were in attendance there. It was not owned by the public, but was under the entire control of the defendant. The people

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who were there came as patrons of the company, and by its invitation, and for its profit. The crowd was made up of individuals. Before it could get smaller some of them must go away. Most of them must go by the same means which brought them. Were all of the first to go guilty of contributory negligence, and only the late goers free from it? No one knew better than defendant the number of persons it had brought to the park. In taking them there it was a fair implication it would afford them reasonably safe guards from danger while on its ground, and reasonable facilities for returning home. No individual could get upon a car without getting into the vicinity of where it stopped. There is no testimony indicating plaintiff attempted to board a moving car. Her testimony is that she did not. We do not think it can be said as a matter of law that because of what these girls did, they are guilty of contributory negligence. At most, it would present a question for the jury.

To return to the first question, was defendant guilty of negligence? It knew what its facilities were for taking care of a crowd. It knew its facilities for handling them. It invited the people who constituted the crowd to come. In the exercise of ordinary care it would know, and doubtless did know, approximately the size of the crowd. It also knew that many of its members would be eager to return home after a period of time had elapsed. The precise point involved here, so far as we know, has not been decided, but there are authorities which afford some light in relation to the principle involved. In *Breege v. Powers*, 80 Mich. 172, 45 N. W. 130, Justice Long, speaking for the court quoted with approval the following language from Cooley on Torts, 606: "It has been stated on a preceding page that one is under no obligation to keep his premises in a safe condition for the visits of trespassers. On the other hand when he expressly, or by implication, invites others to come upon his premises, whether for business, or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." And added: "This rule is the doctrine of all the courts, and I know of no rule to the contrary." Citing a large number of cases.

In *Sheldon v. Railroad Company*, 59 Mich. 172, 26 N. W. 507, a boy who was on a railroad platform listening to a band of music, was, because of the inconsiderate action of the crowd which had been attracted by the music, pushed in front of a backing train and killed. It was held that whether the degree of care exercised was commensurate with the duty imposed presented a question of fact peculiarly within the province of the jury. The case of *Taylor v. Railroad Company (C. C.)* 50 Fed. 755, is very suggestive: "The suit was for damages sustained by the plaintiff in the Union Depot in Pittsburgh, while she was about to pass out of one of the exit gates through which the passengers were required to go to reach the cars. The depot was under the control of the defendant company. There was a large

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crowd gathered in Pittsburgh to attend a celebration. She waited in a large vestibule at the depot to take the cars from the depot home, and the crowd packed in around and behind her. One of the the gates opening from the vestibule where she was waiting was opened for passengers to take the cars, and the crowd began to move, and she moved with it. When she reached an iron railing, constructed to turn people to the narrow exit of the gateway, 'she was, by a sudden surging of the throng, forced and jammed against the railing and injured'; and the case having been submitted to the jury, a verdict was returned for the plaintiff. The court in disposing of the case used the following language: 'Did the defendant exercise ordinary care in providing a suitable force of officers and employees to properly control and direct the movement of the unprecedented throng which it was advised would crowd through its depot rooms, vestibules, corridors, and gates to reach its trains? * * * The only remaining question, therefore is, did the defendant exercise ordinary care in providing a suitable force to properly control and direct the movements of the unprecedented crowd there in its custody? The evidence brought by the defendant was that it made application to the chief of police of Pittsburgh for an extra force of patrolmen, and got all it wanted, and that at the time of the accident it had from 20 to 40 policemen, and, with its own employees, had about 100 men in and about the depot to direct and control the crowd in its approach to the depot, while in the depot, and while going to the train.' The jury was instructed, 'A passenger while in actual progress on his journey is necessarily exposed to innumerable hazards; is wholly under the care of the carrier; and, in view of these dangers, which he can in no respect control, the law imposes upon such carrier the greatest possible vigilance as to the passenger's safety, and holds it responsible for the slightest negligence. This degree of care is fixed not solely because of the relation of carrier and passenger; it is measured by the consequences which may follow the want of care. A carrier is held to this highest degree of care as to the condition of its engines, cars, roadway, bridges, and other appliances, because negligence as to any of them involves extreme peril to passengers, against which they cannot protect themselves. But a rule properly ceases with the reason for it. Therefore, as a passenger's detention at a station, or his exit to his train, is not attended with the hazards pertaining to the journeys on the cars, running at a rapid rate of speed, the degree of care above defined is justly lessened to the extent that in such a place, and at such a time the carrier is bound to exercise only a reasonable degree of care for the protection of its passengers. This reasonable and ordinary care depends largely upon the circumstances of each particular case, and is such care as a person of reasonable and ordinary prudence and skill would usually exercise under the same or similar circumstances. * * * The witness for the plaintiff characterized the crowd as orderly and jolly. As I have stated, the defendant could not be held liable to that degree of diligence,

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that called for a guard for every passenger. It was not bound to provide a policeman for each person, to protect him or her from violence of fellow passengers, but it was bound to furnish a suitable number of its officers or police to properly control, as a body, such a crowd of passengers to the extent already stated. If you find it did this, it discharged its duty to the plaintiff, and cannot be held liable for this injury.' The court said: 'These instructions correctly state the law as applicable to the case. The degree of care to which the defendant was held in its relation and duty to the plaintiff at the time of the accident was just.' * * * 'They had the right to suppose that the precautions to be taken for their safety and protection would be commensurate with the increased dangers confronting them. Of these increased dangers, the defendant had the first and most trustworthy warning. * * * The crowd immediately surrounding the gates, waiting to be passed through, was permitted to become too dense for proper control or safe exit. The police and guards, as they were stationed, were unable to keep the crowd back. Whether, because they were not stationed at the most suitable places, or because they were not active and energetic enough, is not now for me to determine. The jury found want of ordinary care in some of these respects, and I am not justified in saying such a conclusion is not supported by sufficient evidence. * * * If the carrier which has solicited the 10,000 passengers to travel over its road cannot give to them this proper measure of care, and an injury thereby follows, it is responsible. It cannot invite and undertake to transport more passengers than its capacity justifies, and then excuse itself by claiming an unprecedented crowd, and that ordinary care as to the passengers in its depot was used.' "

In *Railroad Company v. Treat*, 75 Ill. App. 322, a person who had purchased a ticket passed through a turnstile to the platform and was hurt, and it was said in substance in deciding the case: "A railroad company is bound to use reasonable care in providing for the safety and protection of its passengers while in its inclosures, and while being conducted to its trains, with due regard to the number and character of those on its premises, and with due reference to the risks to which they are exposed; and this duty may require it to provide a suitable number of men to properly control the crowd and to protect its passengers from the dangers incident thereto."

The case of *McGearty v. Manhattan Ry. Co.* (Sup.) 43 N. Y. Supp. 1086, was an action to recover damages for personal injuries sustained by the plaintiff, occasioned by his being crowded from the platform by the passengers assembled at the defendant's elevated station at Grand street, in the city of New York, which caused the plaintiff to fall into the street below. The court said: "It may be conceded that defendant's elevated station at Grand street is properly constructed, and sufficient in extent to answer all the ordinary requirements for which it is used, and accommodate the passengers who assemble there for the purpose of board-

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ing the defendant's trains, but the theory upon which the case was tried and submitted to the jury, and upon which the negligence of the defendant was predicated, did not necessarily involve this question. The negligence of the defendant was based, not upon any infirmity in the structure, as a structure, but upon the character of its use at the particular time. It was sufficient to accommodate ordinary traffic, for, so fast as the platform filled with passengers, they were removed by the trains which stopped at the station for that purpose at frequent intervals. It is easy to see that, as there was a constant accumulation of passengers upon the platform, unless they were removed by the trains, the platform of the station would become overcrowded, and that such overcrowding might render the place unsafe. This was shown by the condition in this case. The trains did not remove the passengers as fast as they accumulated, and the defendant continued to sell tickets and admit passengers to the platform. When the plaintiff entered upon the platform, it was a safe place, and he had the right to assume that no part of it would be rendered unsafe by any act of the defendant. The obligation imposed upon the defendant was to take reasonable care in securing the safety of the passenger while upon its premises, and to see that he was exposed to no unnecessary danger while there. The defendant must be assumed to have known the capacity of its platform, and when it had admitted passengers to the extent of such capacity, if when having done this, the passengers were not removed by its trains, it became its duty to permit no more to enter. It had no more right to accumulate a crowd at the rear, which, pressing forward, would precipitate those at the edge of the platform into the street, than it would have the right to go upon the platform and push them off by physical force." See, also, *Dawson v. Trustees* (Sup.) 52 N. Y. Supp. 133; *Lehr v. R. R. Co.*, 118 N. Y. 556, 23 N. E. 889.

The reasoning of these authorities seems to be without flaw, and applied to the facts of this case would require both questions discussed herein, to be submitted to the jury.

Judgment is reversed, and new trial ordered.

DAVIS v. CAMDEN, G. & W. Ry. Co.

(Supreme Court of New Jersey, June 11, 1906.)

[63 Atl. Rep. 843.]

Carriers—Alighting from Street Car.*—A standing trolley car is an invitation for a passenger to alight, and he has the right to assume

*For the authorities in this series on the subject of the right of a passenger to rely on the assumption that the carrier has performed or will perform its duties to him, see foot-notes appended to *Chesapeake & O. Ry. v. Harris* (Va.), 18 R. R. R. 139, 41 Am. & Eng. R. Cas., N. S., 139.

For the authorities in this series on the question, what constitutes

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that the car will not be moved, without signal or notice to him, while he is openly and expeditiously so doing.

Same—Contributory Negligence.†—It is not negligence per se to rise from a seat and step to the side of a slowly moving open car which is coming to a stop, for the purpose of getting upon the run-board to alight when the car does stop.

(Syllabus by the Court.)

Action by Hannah A. Davis against Camden, Gloucester & Woodberry Railway Company. Verdict for plaintiff. Rule to show cause discharged.

Argued June term, 1905, before the CHIEF JUSTICE, and FORT, PITNEY, and REED, JJ.

E. A. Armstrong, for the rule.

R. W. E. Donges, opposed.

FORT, J. The plaintiff was a passenger on a trolley car of the defendant. She claims that while upon the runboard of the car and in the act of alighting, the car was started by the motorman without signal, and without any notice or warning that it was about to be started. When the plaintiff rested, the evidence of the plaintiff and her granddaughter, a child of 12 years, established these facts. Upon the evidence, the nonsuit was rightly refused. The defense was that the car was not stopped, but simply coming to a stop at the time the plaintiff stepped upon the runboard, and that she fell from it before the car actually stopped. The motorman and conductor testified that the car stopped within three or four feet after she fell. The conductor says he saw the plaintiff standing at the edge of the car, and he called to her to wait until the car stopped, and gave one quick bell to the motorman to stop the car just as the plaintiff stepped to the runboard and fell. Mr. Hammond, the man whom the motorman says he was stopping the car to permit to board it, testified that he signaled the car to stop, "and the motorman stopped the car, and just as the car came to a standstill I stepped on." In answer to the question, "Did the lady step off the car before or after you?" he said: "Well, it seems to me, as I observed the whole affair, that we were both stepping about the same time." He was also asked: "Will you please tell me whether or not, as you stepped on the car, it had fully stopped?" His answer was: "The car had come to a stop; had just come to a stop as I stepped up." Dr. Stratton, a passenger who was called by the defendant, also testified that as Hammond got on it stopped. He further says: "Of course, I did not pay any

an invitation to a passenger to alight from a street car or train, see foot-notes appended to *Mearns v. Central R. R. (C. C. A.)*, 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97.

†For the authorities in this series on the question whether it is contributory negligence on the part of a passenger to stand in a moving car, see foot-notes appended to *Krumm v. St. Louis, etc., Ry. Co. (Ark.)*, 9 R. R. R. 821, 32 Am. & Eng. R. Cas., N. S., 821; foot-notes appended to *Shamblin v. New Orleans & N. W. R. Co. (La.)*, 16 R. R. R. 528, 39 Am. & Eng. R. Cas., N. S., 528.

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attention until I heard this little girl." He further said that when she fell, "I don't think the car was in motion." Another witness (a Mrs. Pennington) who says she was standing on her porch close to the place of the accident, was asked: "When she stepped off, Mrs. Pennington, how near was the car stopped?" Her answer was: "Well, it was going slow, but it was moving." She also says: "The car did not go more than its length after the plaintiff fell, if it went that far." This witness also testifies that the conductor did not get off the car, after the plaintiff fell, before the crowd moved away, and in this her testimony differs from that of every other witness. She says, however, she saw the plaintiff get up and shake the dust off herself, and heard her say there was nothing the matter with her, and then the witness says: "When she [the plaintiff] said there was nothing the matter with her, I shut the door and went into the house."

When the case was closed there was a motion to direct a verdict for the defendant, which was refused. This we also think was right. Whether the car had stopped and was started while the plaintiff was alighting, was clearly, under the proof, for the jury. Conceding that the plaintiff was upon, or getting upon, the runboard, as the car was slowly coming to a stop, to be ready to alight when it did stop, still this fact, standing alone, is not sufficient to justify a direction for the defendant. It is not negligence per se to rise from a seat and step to the side of a slowly moving open car, which is coming to a stop, for the purpose of getting upon the runboard to alight when the car does stop. *Scott v. Bergen Co. T. Co.*, 63 N. J. Law 408, 43 Atl. 1060; *Consolidated T. Co. v. Thalheimer*, 59 N. J. Law 474, 37 Atl. 132. When the evidence was all in, it was a question for the jury, under the proof, whether the car had, as the plaintiff contended, come to a full stop while she was getting upon, or after she was upon, the runboard, and was then started up again by the motorman without signal from the conductor or without notice or warning to the plaintiff that it was to be started up. The plaintiff's counsel, in answer to an inquiry from the court, stated that the negligence of the defendant's servant relied upon was that the motorman, after the car had fully stopped, and while the plaintiff was in the act of alighting, had started the car, or permitted it to start, with such speed as to throw her from the runboard. This was the sole question relied upon by the plaintiff, and the only question submitted to the jury by the learned trial justice.

Error is also assigned on the charge of the learned trial justice, which was, in full, as follows: "Gentlemen of the Jury: If the motorman brought this car to a stop, and while it was at a stop, the plaintiff began to get off the car, and while she was getting off the motorman started up the car again and threw her, then she is entitled to recover a verdict against the company for pain and suffering, and expense, and inconvenience occasioned by her accident. Now, in determining that question, the single fact for you to settle, the only fact for you to settle, is

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that the car will not be moved, without signal or notice he is openly and expeditiously so doing.

Same—Contributory Negligence.†—It is not necessary for the plaintiff to rise from a seat and step to the side of a slow moving car which is coming to a stop, for the purpose of getting on the board to alight when the car does stop.

(Syllabus by the Court.)

Action by Hannah A. Davis against Woodberry Railway Company. Verdict for plaintiff. Motion to show cause discharged.

Argued June term, 1905, before PITNEY, and REED, JJ.

E. A. Armstrong, for the plaintiff;
R. W. E. Donges, for the defendant.

FORT, J. The plaintiff is the defendant. She claims that she was thrown from the car in the act of alighting without signal, and was about to be started. The plaintiff and her husband established these facts and the defendant rightly refused.

but simply coming to the runboard, the car stopped. The plaintiff stopped with

says he saw the plaintiff, or it did not. On that point the proof. This was clearly a jury question, under the charge, which very tersely called to the attention of the jury to the question of the weight of the evidence. The weight of the evidence was with the plaintiff; to the jury the lack of specificity on the vital question in the evidence of Dr. Stratton and Mrs. Pennington, testimony of the testimony of the plaintiff, her grand-son, and Mr. Hammond, who were the three participants in the accident, we think the verdict cannot be disturbed on the ground that it is against the weight of the evidence. The rule to show cause is discharged.

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tion to the question of the weight of evi-

eight of the evidence was with the plaintiff;

the lack of specificity on the vital question in

the evidence of Dr. Stratton and Mrs. Pennington,

testimony of the testimony of the plaintiff, her grand-

and Mr. Hammond, who were the three participants

the fully conversant with the actual incidents leading up

the accident, we think the verdict cannot be disturbed on the

ground that it is against the weight of the evidence.

The rule to show cause is discharged.

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Davis v. Southern Ry.
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SULLIVAN v. SOUTHERN RY.

South Carolina, May 25, 1906.)

4. Rep. 586.]

passenger buys a ticket from a
on another line with which a
the carrier must check the
not require the passenger

a ticket agent refused
at on another line to
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he threw the baggage out
charge of it, it authorizes a
passenger.

ode, 1902, § 2166, prescribing a pen-
baggage, is not exclusive, and does not
uing for damages suffered.

is, J., dissenting.

Common Pleas Circuit Court of Greenwood
Judge.

for B. A. Sullivan against the Southern Railway.
Plaintiff, and defendant appeals. Affirmed.

P. Cothran, for appellant.
Sheppards, Grier & Park, for respondent.

POPE, C. J. The plaintiff sought by this action \$1,000 damages
account of the alleged willful and malicious acts of the de-
fendant in refusing to check the baggage of the plaintiff, who
was a passenger with a ticket from Abbeville to Greenwood on
the 19th of September, 1902, and in throwing said baggage from
the train and allowing it to remain uncared for.

The history of the case as taken from the appellant's brief is
about as follows: "That on September 19, 1902, the plaintiff
purchased at Abbeville a ticket from Abbeville to Greenwood,
and requested the agent to check his baggage accordingly, pay-
ing him 45 cents excess baggage charges; the agent, however,
checked the baggage to Hodges; plaintiff went to the agent
again and directed him to check to Greenwood; the agent will-
fully and maliciously refused to do so, repaid the plaintiff 45
cents and cast the trunk off the train, informing the plaintiff

*For the authorities in this series on the subject of the right to
recover exemplary or punitive damages for wrongs to passengers,
see foot-notes appended to Little Rock Traction & Elec. Co. v.
Winn (Ark.), 19 R. R. R. 349, 42 Am. & Eng. R. Cas., N. S., 349;
foot-notes appended to Ammons v. Southern Ry. Co. (N. Car.), 19
R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; Seaboard Air Line
Ry. v. O'Quin (Ga.), 19 R. R. R. 103, 42 Am. & Eng. R. Cas., N. S.,
103; foot-note appended to Richardson v. Atlantic Coast Line R. R.
(S. Car.), 18 R. R. R. 349, 41 Am. & Eng. R. Cas., N. S., 349; foot-note
appended to Lexington Ry. Co. v. O'Brien (Ky.), 18 R. R. R. 67, 41
Am. & Eng. R. Cas., N. S., 67.

Davis v. Camden, etc., Ry. Co

whether the plaintiff has satisfied you, by the greater weight of proof, that the motorman had brought the car to a full stop before she started to get off. If she has not succeeded in proving that by the greater weight of proof, then your verdict should be for the defendant; if she has satisfied you that the car was at a full stop, then your verdict should be for the plaintiff. You may retire." We find no error in this charge. It is negligence for a motorman to stop a car to take on a passenger and then to start it up again without the usual signal from the conductor, or any notice to passengers who may be in the act of alighting, at the place where the car thus stops. A standing trolley car is an invitation for a passenger to alight, and a passenger proceeding to do so has the right to assume that the car will not be moved without signal or notice to him, while he is openly and expeditiously so doing. That the conductor gave no bell to start the car is admitted, and that the conductor saw the plaintiff in the act of proceeding to alight, he testifies. If, in that state of proof, the jury find that the plaintiff was thrown from the run-board by the motorman starting the car without any signal or notice, that is negligence entitling the plaintiff to damages for injuries resulting therefrom.

It is also contended that the verdict was against the weight of evidence. I think the clear weight of the evidence is that the car had stopped to take Mr. Hammond on. This being so, then it either started and threw the plaintiff, or it did not. On that there was a conflict in the proof. This was clearly a jury question. The jury have found, under the charge, which very tersely directed their attention to the question of the weight of evidence, that the weight of the evidence was with the plaintiff; and, considering the lack of specificness on the vital question in the case, in the evidence of Dr. Stratton and Mrs. Pennington, and the clearness of the testimony of the plaintiff, her granddaughter and Mr. Hammond, who were the three participants who were fully conversant with the actual incidents leading up to the accident, we think the verdict cannot be disturbed on the ground that it is against the weight of the evidence.

The rule to show cause is discharged.

SULLIVAN v. SOUTHERN RY.

(Supreme Court of South Carolina, May 25, 1906.)

[54 S. E. Rep. 586.]

Carriers—Baggage.*—Where a passenger buys a ticket from a point on the carrier's line to a station on another line with which a connection is made at a junctional point, the carrier must check the baggage to the point of destination and cannot require the passenger to recheck at the junctional point.

Same—Refusal to Check—Damages.—Where a ticket agent refused to check the baggage of a passenger to a point on another line to which the passenger had bought a ticket, because under the rules of the company he could only check to the junctional point, and on return of the check to the junctional point he threw the baggage out of the car and refused to take further charge of it, it authorizes a recovery of punitive damages by the passenger.

Same—Exclusive Remedy.—Code, 1902, § 2166, prescribing a penalty for refusing to check baggage, is not exclusive, and does not prevent a passenger from suing for damages suffered.

Gary, A. J., and Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Greenwood County; Watts, Judge.

Action by B. A. Sullivan against the Southern Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

T. P. Cothran, for appellant.

Sheppards, Grier & Park, for respondent.

POPE, C. J. The plaintiff sought by this action \$1,000 damages on account of the alleged willful and malicious acts of the defendant in refusing to check the baggage of the plaintiff, who was a passenger with a ticket from Abbeville to Greenwood on the 19th of September, 1902, and in throwing said baggage from the train and allowing it to remain uncared for.

The history of the case as taken from the appellant's brief is about as follows: "That on September 19, 1902, the plaintiff purchased at Abbeville a ticket from Abbeville to Greenwood, and requested the agent to check his baggage accordingly, paying him 45 cents excess baggage charges; the agent, however, checked the baggage to Hodges; plaintiff went to the agent again and directed him to check to Greenwood; the agent willfully and maliciously refused to do so, repaid the plaintiff 45 cents and cast the trunk off the train, informing the plaintiff

*For the authorities in this series on the subject of the right to recover exemplary or punitive damages for wrongs to passengers, see foot-notes appended to *Little Rock Traction & Elec. Co. v. Winn* (Ark.), 19 R. R. R. 349, 42 Am. & Eng. R. Cas., N. S., 349; foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; *Seaboard Air Line Ry. v. O'Quin* (Ga.), 19 R. R. R. 103, 42 Am. & Eng. R. Cas., N. S., 103; foot-note appended to *Richardson v. Atlantic Coast Line R. R.* (S. Car.), 18 R. R. R. 349, 41 Am. & Eng. R. Cas., N. S., 349; foot-note appended to *Lexington Ry. Co. v. O'Brien* (Ky.), 18 R. R. R. 67, 41 Am. & Eng. R. Cas., N. S., 67.

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that it might lie out on the ground in the weather so far as he was concerned, that it should not be carried into the depot or baggage room; that the train was moving off then, and plaintiff had to wait until he got to Hodges before notifying a friend at Abbeville to look after the baggage and send it to him at Greenwood; that his damages were \$1,000. The defendant denied the material allegations of the complaint as above set forth. The testimony was conflicting upon what occurred at the depot in Abbeville between the plaintiff and the agent of the company. These facts, however, are beyond dispute: At the time in question, the last train leaving Abbeville for Hodges was the 2:20 p. m. train, the one upon which the plaintiff was a passenger. It connected at Hodges with the train for Greenville; a passenger for Greenwood would have to lie over at Hodges from 2:45 p. m. till 9 or 10 o'clock that night, when the train from Greenville would arrive at Hodges and carry him on to Greenwood. The defendant had issued instructions to the agent at Abbeville not to check the baggage through to points beyond Hodges, upon the Abbeville Branch, which did not connect at Hodges with the main line train for the passenger's destination. The reason for this rule was that all baggage from Abbeville to points beyond Hodges was handled directly by the baggage masters upon the two trains; the agent at Hodges having nothing to do with any baggage except that checked to or at Hodges. A ticket was sold to the plaintiff from Abbeville to Greenwood and his baggage was checked to Hodges. The plaintiff insisted that his baggage should be checked to Greenwood; the agent insisted that under his instructions he could not do so; the plaintiff handed back the Hodges checks to the agent, saying that if the baggage could not be checked to Greenwood he need not check it at all; the excess baggage charge was returned to the plaintiff; the baggage was taken off the train and remained at the station until the plaintiff had it carted over to the Seaboard depot and sent to Greenwood; he remained at Hodges from 2:45 p. m. till about 9 or 10 o'clock that night, when he boarded the train from Greenville and arrived at Greenwood in due time; he did not need his baggage until the next morning, when he received it on the Seaboard; his actual damages were 45 cents; the price of a through ticket from Abbeville to Greenwood was 45 cents, 25 cents less than the straight fare from Abbeville to Hodges and thence to Greenwood."

We think it is well to produce the judge's charge and the grounds of appeal therefrom:

Judge's Charge.

"This is an action brought by the plaintiff here against the defendant to recover damages. He alleges in his complaint that he was a traveling salesman, and carried with him trunks of samples of wearing apparel. He states that it was the custom of the defendant, and of other railroads in this state, to carry the samples of traveling salesmen as baggage upon the same

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terms and conditions that they carried personal baggage—except that the railroad requires them to pay excess for the carrying of trunks which contain samples. He states that he carried his trunks of samples from Greenwood, S. C., to Abbeville, S. C., and that the defendant was fully informed that the trunks contained samples; that he paid therefor the sum of 45 cents as excess for carrying this baggage. He alleges that on the 19th day of September, 1902, he went to the depot of the defendant company at Abbeville, S. C., that he paid for that ticket the full fare asked.

He states that he requested the agent of the said defendant company at Abbeville, S. C., to check his trunks from Abbeville, S. C., to Greenwood, S. C., point to which he had purchased said first-class ticket; that he paid the agent of the defendant company at Abbeville, S. C., the sum of 45 cents for excess baggage. He states that the agent there—instead of checking his trunks to Greenwood, S. C., the point to which he had bought his ticket, and the point to which he had requested that his baggage should be checked—checked them to Hodges; that he then went to the agent of the defendant company and directed him to check his baggage from Abbeville, S. C., to Greenwood, S. C., and that the agent of the defendant company willfully and maliciously refused to check his trunks any farther than Hodges, although plaintiff had bought his ticket from Abbeville, S. C., and had paid the excess rate on this baggage from Abbeville, S. C., to Greenwood, S. C. He says that the agent of the defendant company then refunded to him the sum of 45 cents, which he had paid, and willfully and maliciously caused said trunks to be thrown off, and informed plaintiff at the time he did so that the trunks might lie out on the ground in the weather so far as he—said defendant's agent—was concerned, and that they should not be carried into depot or baggage room. He states further that about the time this took place, the train on which plaintiff had taken passage was moving away, and plaintiff was obliged to leave said baggage at the place where the agent of the defendant company had willfully and maliciously cast same until he arrived at Greenwood, S. C., when he notified a friend at Abbeville, S. C., to take charge of it and send it to the plaintiff at Greenwood, S. C., which was done. He states that this act on the part of the agent of the defendant company was willful and malicious, and that in the presence of other people he was humiliated, and he states further, that by reason of that and on account of delay, trouble and expense which he was put to on account of this act of the agent of the defendant company, and his willfulness and maliciousness, he has been damaged in the sum of one thousand dollars, and asks judgment for that amount. The defendant company denies the allegations of the plaintiff's complaint. That is, they deny that their agent acted maliciously in the premises when he cast those trunks off the train, and that he refused to send them to Greenwood, S. C. The defendant company denies each and every thing that the plaintiff alleges.

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"Now those are the issues as made by the complaint of the plaintiff in this case and the answer of the defendant, and upon that you have heard the testimony, and upon that testimony you will apply the law as I give it to you. You have got to decide this case. It is my duty to give you the law, and it is your duty—after finding the facts of this case—to apply the law which I shall give you and arrive at a verdict in that way. Both counsel, in arguing to you, have referred to the fact that this case has been tried before—when there was a mistrial. With that matter you have nothing whatever to do. You are to try this case exactly the same as though it had never been tried before. You are to try it upon the evidence which you have heard adduced on the stand. Now, I charge you, as a matter of law, if the plaintiff in this case went to the agent of the defendant company at Abbeville, S. C., and called for a ticket to Greenwood, S. C., and said agent sold plaintiff a ticket to Greenwood, S. C., and the plaintiff here paid for that ticket what the agent of the defendant company charged him therefor—then, I charge you, as a matter of law, that it was the duty of the agent of the defendant company to check the baggage of the plaintiff—upon the payment of the excess fare being paid—to the point to which he had purchased his ticket. And if there was no excess baggage, it was the duty of the agent of defendant company to check that baggage to the point to which he sold the ticket. If the agent of the defendant company sold the plaintiff a ticket from Abbeville, S. C., to Greenwood, S. C., then it was his duty to check that baggage to that point to which he had sold him the ticket. If the agent of the defendant company refused to check the baggage of the plaintiff, after selling him a ticket—if you believe that the agent did sell plaintiff a ticket from Abbeville, S. C., to Greenwood, S. C., and that was intentional, high-handed, willful, malicious, and wanton invasion of the rights of the plaintiff here, then, in addition to such actual damage as he sustained, if you believe that he sustained any damages in the premises, you will give him such exemplary damages and smart-money as you think fit to deter the agent of the defendant company or the defendant company from treating anybody else that way. If it was an intentional, high-handed, willful, outrageous and wanton invasion of plaintiff's rights.

"Now, I charge you, as a matter of law, that if there was a junctional point between Greenwood, S. C., and Abbeville, S. C., where passengers had to change cars on the line of the defendant's road, and if there was no connection made there, then it was not the duty of the agent of the defendant company to sell a ticket or to check baggage any farther than to the junctional point—if no connection was made there. But I charge you farther, as a matter of law, whether they made any connection or not, if the agent of the defendant company at Abbeville, S. C., sold the plaintiff a ticket to Greenwood, S. C., then it was the duty of the said agent at Abbeville to check plaintiff's baggage from the point at which he purchased his ticket to the point to

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which he purchased it, because if he assumed to sell him the ticket, and the plaintiff bought one and paid for it, then there was an obligation on the part of the defendant railroad company to check his baggage from the point at which he purchased his ticket to the point to which he purchased it. And if the agent of the defendant company willfully, and maliciously, and wantonly, and intentionally refused to check his (the plaintiff's) baggage from the point at which he had purchased his ticket to the point to which he had purchased it, then it was an intentional, willful and high-handed invasion of plaintiff's rights, and in addition to such actual damages as he sustained he would be entitled—if you believe it was a wanton, malicious, willful, and high-handed invasion of plaintiff's rights—to such punitive damages, exemplary damages and damage in the way of punishment as the jury may see fit to award to him, not more than the amount asked for—which is \$1,000. Now, I charge you further as a matter of law that if you are satisfied that when the plaintiff purchased a ticket at Abbeville, S. C., if you believe that he did purchase a ticket from the agent of the defendant company there, to Greenwood, S. C., and if the agent of the defendant company at Abbeville, S. C., informed plaintiff at the time that he (the agent) could not check his trunks, or baggage, any farther than to Hodges, and if plaintiff accepted this ticket with that statement and with that understanding that, while he was to have a ticket to Greenwood, S. C., his baggage was only to be checked to Hodges, S. C., then I charge you, if you believe that, the plaintiff here is not entitled to recover anything at all. Now, I charge you further, that, if the plaintiff here bought this ticket from Abbeville, S. C., to Greenwood, S. C., and nothing further was said, and he paid for that ticket, it was the duty of the agent of the defendant company at Abbeville, S. C., to check plaintiff's baggage to Greenwood, S. C.; the point to which his (plaintiff's) ticket had been purchased. If you believe that this ticket was purchased there at Abbeville, S. C., to Greenwood, S. C., and there was a conscious failure on the part of the said agent of the defendant company to observe due care, then the Supreme Court has said that: "The jury who tries the case might infer wantonness from the conscious failure to observe due care, if they see proper."

"The plaintiff has requested me to charge you on the following propositions of law: Fifth request of plaintiff: 'The jury will consider all of the facts in the case, but are instructed that they are not to be controlled by the mere fact of the amount of actual damages, if the evidence shows a willful and wanton disregard by the defendant company, or its agent, of the legal rights of the plaintiff.' I charge you that.

"Now the defendant has requested me to charge you on the following propositions of law: '(1) A carrier is not obliged to sell a passenger a ticket and check his baggage to a point not reached by the train he proposes to take, nor by the train with

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which such train makes connection at an intermediate junctional point.' I charge you that while it is not required to do that, yet, if they do sell a ticket to a certain point, it is their duty to check his baggage to the point to which the ticket is purchased upon the tender of the excess fare or proper charge, if any. '(2) A carrier has the right to insist that the passenger accompany his baggage on the same train from initial point to destination, and if the passenger's trip calls for such a lay-over as imposes upon the carrier the duty of a warehouseman, the carrier has the right to require the passenger to check his baggage to such lay-over point and to recheck it upon departure of the connecting train to his destination.' I refuse to charge you about a passenger being required to accompany his baggage. I do not know any law that requires any passenger to go on the same train that his baggage is on. '(3) If a passenger proposes to take a train which, by ordinary and reasonable schedule of the company, does not connect at an intermediate junctional point with a train for his destination, necessitating a lay-over at such junctional point of sufficient length of time to impose upon the carrier the liability of a warehouseman during the interval, he has no right to demand that his baggage be checked through to his destination.' I charge you that, and I charge you further that, while this is good law, that if they do sell a ticket to any point and that ticket is paid for, then it is their duty to check the passenger's baggage from the point where he bought his ticket to the point to which it was purchased. (4) I refuse to charge the fourth request on part of the defendant. (The remedy for willfully refusing to check baggage, under section 2166, vol. 1. Code Laws 1902, is exclusive, and under it the defendant, if guilty, is only liable to a forfeiture of \$10, to be collected in the manner prescribed in section 2207.)

"Now, gentlemen, I restate to you that if you believe that Mr Sullivan purchased this ticket, and that at the time he purchased it he was informed by the agent of the defendant company that they could not check his baggage any farther than Hodges, and if he accepted it in that way and accepted that statement, he would not be entitled to recover. But if he bought that ticket from Abbeville, S. C., to Greenwood, S. C., then it was the duty of the railroad company to check his baggage from Abbeville, S. C., to Greenwood, S. C., and if they refused to check it, and that refusal was the result of maliciousness on their part, or of wantonness on their part, or was an intentional, high-handed, willful invasion of the rights of the plaintiff, then he is entitled to recover, not only such actual damages as he sustained, but such exemplary damages as the jury see fit to award."

Exceptions.

The defendant appeals to the Supreme Court from the judgment entered upon the verdict herein upon the following exceptions and grounds of appeal:

"1. Error of the presiding judge in charging the jury that if

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the defendant sold the plaintiff a ticket from Abbeville to Greenwood, as matter of law, it was the duty of the defendant's agent at Abbeville to check the plaintiff's baggage from Abbeville to Greenwood. Specifications: (1) The contract of carriage evidenced by the ticket implies a contract to transport the passenger from the initial point to the point of destination, but not necessarily to check his baggage from such point to such point. (2) The sale of the ticket does not preclude the carrier from adopting and enforcing such reasonable regulations concerning the checking of the baggage, not strictly conformable to the rules stated by the circuit judge, as the circumstances may demand.

"(2) Error of the presiding judge in charging the jury that even if there was a junctional point between Abbeville and Greenwood where passengers had to change cars on the line of the defendant's railroad and where there was no connection made, yet if the agent of the defendant at Abbeville sold the plaintiff a ticket to Greenwood, it was the duty of the agent at Abbeville to check the plaintiff's baggage from Abbeville, the point at which he bought his ticket, to Greenwood, the point of destination. Specifications: (1) The contract of carriage evidenced by the ticket implies a contract to transport the baggage of the passenger from the initial point to the point of destination, but not necessarily to check his baggage from such point to such point. (2) Under the circumstances stated the carrier has the right to adopt reasonable regulations for handling baggage, which may include the obligation upon the passenger to recheck his baggage at such junctional point.

"(3) Error of the presiding judge in charging the jury that if the agent of the defendant company willfully, maliciously, wantonly and intentionally refused to check plaintiff's baggage from the point at which he purchased his ticket to the point to which he purchased it, the jury might award punitive damages not exceeding \$1,000, the amount claimed in the complaint. Specifications: (1) The plaintiff did not have the right to insist upon his baggage being checked through to Greenwood. The contract of carriage evidenced by the ticket implied a contract to transport, and not necessarily to check the baggage through to Greenwood. Punitive damages cannot be awarded except for the willful denial of a right. (2) The remedy for willfully refusing to check baggage is under section 2166, vol. 1, Code Laws 1902, exclusive, and under it, the defendant, if guilty, is only liable to a forfeiture of \$10, to be collected in the manner prescribed in section 2207.

"(4) Error of the presiding judge in predicating the right of the defendant to require the plaintiff to recheck his baggage at Hodges upon an agreement to that effect made by the plaintiff at the time he purchased the ticket. Specifications: (1) If Hodges was a junctional point between Abbeville and Greenwood, where passengers had to change cars, and where there was no connection made, although the agent may have sold the

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ticket without making any reference to checking the baggage, he had the right under a reasonable regulation of the company to decline to check the baggage to Greenwood and to insist upon checking it to the junctional point and to require the plaintiff to recheck it thence to Greenwood. For the reason that the contract of carriage evidenced by the ticket implied a contract to transport but not necessarily to check the baggage through to Greenwood, the defendant had the right to adopt reasonable regulations, under the circumstances of the case, for handling the baggage, which may have included the obligation upon the plaintiff to recheck his baggage at such junctional point.

“(5) Error of the presiding judge in charging the jury that the jury might infer wantonness if they found that there was a conscious failure on the part of the agent of the defendant company to observe due care. Specifications: The acts warranting punitive damages must proceed from a design to injure; they must be done willfully, wantonly, maliciously or recklessly. The failure to observe due care is simply negligence, and negligence may arise consciously without the least intention to injure or without partaking of the nature of those acts warranting punitive damages.

“(6) Error of the presiding judge in modifying the defendant's first request to charge. The request was as follows: ‘A carrier is not obliged to sell a passenger a ticket and check his baggage to a point not reached by the train he proposes to take, nor by the train with which such train makes connection at an intermediate junctional point.’ The modification was as follows: ‘I charge you that, while he is not required to do that, yet, if they do sell a ticket to a certain point, it is their duty to check his baggage to the point to which the ticket is purchased to, upon the tender of excess fare or proper charge, if any.’ Specifications of error: (1) The contract of carriage evidenced by the ticket implies a contract to transport the baggage of the passenger from the initial point to the point of destination, but not necessarily to check his baggage from such point to such point. (2) When the destination is a point not reached by the train the passenger proposes to take, nor by the train with which such train makes connection at an intermediate junctional point, the carrier even after selling the ticket has the right to decline to check the baggage through and to require the passenger to recheck his baggage at such intermediate junctional point, provided the circumstances of the situation are such as to render such a regulation a reasonable one for its convenient handling of the baggage.

“(7) Error of the presiding judge in refusing the defendant's second request to charge, which was as follows: ‘A carrier has the right to insist that the passenger accompany his baggage on the same train from initial point to destination, and if the passenger's trip calls for such a lay-over as to impose upon the carrier the duty of a warehouseman, the carrier has the right to require the passenger to check his baggage to such lay-over point

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and recheck it upon departure of the connecting train to his destination.' Specifications: Said request contained correct principles of law applicable to the case.

"(8) Error of the presiding judge in modifying the defendant's third request to charge. The request was as follows: 'If a passenger proposes to take a train, which, by the ordinary and reasonable schedule of the company, does not connect at an intermediate junctional point with a train for his destination, necessitating a lay-over at such junctional point of sufficient length of time to impose upon the carrier the duty of a warehouseman during the interval, he has no right to demand that his baggage be checked through to his destination.' The modification was as follows: 'I charge you that, and I charge you further that, while this is a good law, that if they do sell a ticket to any point and that ticket is paid for, then it is their duty to check the passenger's baggage from the point where he bought the ticket to the point to which it was purchased.' Specifications of error: (1) The contract of carriage evidenced by the ticket implies a contract to transport the baggage of the passenger from the initial point to the point of destination, but not necessarily to check his baggage from such point to such point. (2) When the destination is a point not reached by the train the passenger purposes to take, nor by the train with which such train makes connection at an intermediate junctional point, the carrier, even after selling the ticket, has the right to decline to check the baggage through and to require the passenger to recheck his baggage at such intermediate point, provided the circumstances of the situation are such as to render such a regulation a reasonable one for its convenient handling of the baggage.

"(9) Error of the presiding judge in refusing the defendant's fourth request to charge. The request was as follows: 'The remedy for willfully refusing to check baggage under section 2166, vol. 1, Code Laws 1902, is exclusive, and under it the defendant, if guilty, is only liable to a forfeiture of \$10, to be collected in the manner prescribed in section 2207.' Specifications: The said request contained a correct principle of law applicable to the case.

"(10) Error in refusing defendant's motion for a new trial upon the ground that there was no evidence of a willful or malicious tort or of such a tort as warranted the infliction of punitive damages."

We will now examine the exceptions, which are reduced to seven, in their order:

1. The defendant issued a ticket to the plaintiff on the 19th of September, 1902, from Abbeville to Greenwood, and for this ticket received the compensation fixed by statute. It makes no difference whether this was a gratuitous act on the part of the defendant or not; it was its contract for carriage of the plaintiff from Abbeville to Greenwood, and it was, therefore, in the power of the plaintiff to force the defendant to comply with its

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said contract, and when the plaintiff requested a check for transportation of a trunk in good shipping order, the railroad corporation was bound to redeliver such baggage upon the surrender of its check. See section 2106, vol. 1, Code Laws 1902. It is no part of the business of the courts to consider moral obligations when a positive requirement of the law lays down the duty of both passenger and carrier. The moment, therefore, the defendant issued its ticket to the plaintiff, then and there it became bound to issue its check for the baggage of the passenger from Abbeville to Greenwood. It was no longer an implied contract, it became an expressed contract. This exception is, therefore, overruled.

2. I am at a loss to understand any regulation adopted by the defendant in regard to checking the baggage of the plaintiff, for the statute has spoken and it is the duty to obey the law as it is written, rather than for the defendant to attempt to set up some regulation of its own in contravention of its statutory duty. This exception is overruled.

3. There is nothing in this proposition of the defendant. If the defendant sees proper to carry the baggage of the plaintiff in another train than that by which the plaintiff is carried to his destination, no objection can be made, provided the baggage is delivered at the time the passenger reaches his destination. This exception is overruled.

4. Wantonness largely enters into a conscious failure to observe due care. *Pickens v. R. R.*, 54 S. C. 505, 32 S. E. 567, where it is said: "The element which distinguishes actionable negligence from criminal wrong or willful tort, is inadvertence on the part of the person causing the injury. He may advert to the act of omission of which he is guilty, but he cannot advert to it as a failure of duty; that is, he cannot be conscious that it is want of ordinary care, without subjecting himself to the charge of having inflicted a willful injury, because one who is consciously guilty of want of ordinary care is, by implication of law, chargeable with an intent to injure, malice being but the 'willful doing of a wrong act' * * * negligence and willfulness are opposites of each other. They indicate radically different mental states. The distinction between negligence and willful tort is important to be observed, not only to avoid a confusion of principles, but it is necessary in determining the question of damages, since in case of an injury by the former, damages can only be compensatory; while in the latter they may also be punitive, vindictive or exemplary." This exception must be overruled.

5. It is quite true that the remedy for refusal to check baggage as prescribed by section 2166 of the Civil Code of 1902 provides a suit for a penalty, yet it is not exclusive. This section 2166 does state that a person guilty of the same shall forfeit \$10 for each offense, yet section 2207 of the Code provides that: "In case of all fines or forfeitures provided for or prescribed in this chapter, such fines or forfeitures shall be collected by an

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action to be brought in the name of the state against the offending person or corporation in any court of competent jurisdiction, by the Attorney General of this state or the solicitor of the court in which the offense is in whole or in part committed." Section 2166 provides for no remedy to the person injured and whose rights have been invaded; it is like all other criminal statutes. A man may be punished by a prosecution by the state for an assault and battery, yet the person injured by such assault and battery has his action on the civil side of the court. *McDaniel v. Monroe*, 63 S. C. 312, 41 S. E. 456. But section 2208 of the chapter of the Code we are considering states: "This chapter [which embraces sections 2166 and 2207] shall not be so construed as to waive or affect the right of any person injured by the violation of any law in regard to railroad corporations from prosecuting or proceeding for his private damages in any manner allowed by law. But the remedies hereby given the persons injured shall be regarded as cumulative to any and all the remedies now given by or existing at law against railroad corporations." *Kamitsky v. R. R. Co.*, 25 S. C. 53. The case of *Ross v. R. R.*, 33 S. C. 478, 12 S. E. 101, cannot be used for the purpose suggested by the appellant, for the statute of this state regulating condemnation proceedings against railroads provides a remedy by its very terms in favor of all private rights invaded by the railroads in securing rights of way. Of course, it is exclusive, and so would section 2166 have been if it had provided a remedy for the person aggrieved. This exception is overruled.

6. We do not think that the circuit judge committed error when he refused a new trial, as he did, because there was evidence which tended to show that the action of the defendant was both willful and malicious. It is true there was a conflict of testimony, but the jury solved the doubt in favor of the plaintiff's showing. This exception is overruled.

The members of this court being equally divided in opinion, the judgment of the circuit court stands affirmed.

CARPENTER v. BALTIMORE & O. R. Co.

(Superior Court of Delaware, New Castle, Feb. 23, 1906.)

[64 Atl. Rep. 252.]

Carriers—Definition.*—A common carrier is one who undertakes as a public employment the transportation of goods for persons generally from place to place, to be delivered at the place appointed,

*For the authorities in this series on the question, who are, and are not, common carriers, see *Agee & Co. v. Louisville & N. R. Co.* (Ala.), 18 R. R. R. 129, 41 Am. & Eng. R. Cas., N. S., 129 (a railroad, which serves business houses located along a spur track by delivering to them cars of freight and cars to be freighted and shipped, is a common carrier with respect to the use it makes of the track); note, 2 Am. & Eng. R. Cas., N. S., 566 (railroads); *Pullman Palace-Car Co.*

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for hire or reward, and with or without a special agreement as to price.

Same—Care Required—Extent of Liability.†—A common carrier is bound to exercise the strictest care and to deliver safely at their destination the goods intrusted to him and in this respect, he is an insurer of the goods, so that if they are lost or destroyed, except by the act of God or a public enemy, nothing will excuse him.

Same—Act of God.‡—An act of God which will excuse a common carrier for loss of goods is such an inevitable accident as cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning, tempests, floods, etc.

Same—Negligence of Shipper—Natural Wear and Tear.§—A common carrier is not responsible for a loss or injury occasioned by bad or imperfect packing, or other carelessness or negligence of the shipper, or for ordinary wear and tear of the goods in the course of transportation, or for any inherent natural infirmity or tendency to damage, depreciation, or decay, etc.

Same—Injury to Goods—Measure of Damages.||—Where goods are injured under such circumstances as to render the common carrier liable, the measure of damages is the difference between the value of goods and their damaged state and what would have been their value if delivered in good order.

Same—Limitation of Liability—Validity of Contract.¶—A contract fairly made between a shipper and a common carrier, whereby, in consideration of a reduced rate of freight, it is agreed that in case of loss or injury the carrier shall be liable only to the extent of an agreed valuation of the goods, is valid.

Same.—A common carrier cannot relieve himself from any part of his common-law liability for the loss or destruction of property carried by him, except by express or implied contract with the shipper.

Same—Special Agreement—Burden of Proof.**—When a common carrier claims the benefit of a special agreement limiting liability for loss of goods, the burden is on the carrier to prove the special agreement.

v. Lawrence (Miss.), 8 Am. & Eng. R. Cas., N. S., 59; *East Omaha St. R. Co. v. Godola* (Neb.), 7 Am. & Eng. R. Cas., N. S., 300 (street railways).

†See foot-notes appended to *Louisville & N. R. Co. v. Smitha* (Ala.), 19 R. R. R. 775, 42 Am. & Eng. R. Cas., N. S., 775.

‡See foot-notes appended to *Alabama Great So. R. Co. v. Quarles & Couturie* (Ala.), 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69.

§For the authorities in this series on the subject of the effect of the shipper's negligence on the liability of the carrier, see foot-notes appended to *Louisville & N. R. Co. v. Smitha* (Ala.), 19 R. R. R. 775, 42 Am. & Eng. R. Cas., N. S., 775.

||For the authorities in this series on the question what are the elements and measure of the damages recoverable for delay in carrying or delivering, and for loss of or injury to, freight, see foot-note appended to *Weston v. Boston & M. R. R.* (Mass.), 19 R. R. R. 718, 42 Am. & Eng. R. Cas., N. S., 718; *Wall v. Atlantic Coast Line R. R.* (S. Car.), 19 R. R. R. 332, 42 Am. & Eng. R. Cas., N. S., 332; *Wesner & White Mfg. Co. v. Atlantic Coast Line R. R.* (S. Car.), 19 R. R. R. 342, 42 Am. & Eng. R. Cas., N. S., 342; foot-notes appended to *Bourland v. Choctaw, etc., Ry. Co.* (Tex.), 19 R. R. R. 61, 42 Am. & Eng. R. Cas., N. S., 61; *Chicago, B. & Q. Ry. Co. v. Todd* (Neb.), 19 R. R. R. 113, 42 Am. & Eng. R. Cas., N. S., 113; foot-note appended to *Central of Ga. Ry. Co. v. Chicago Portrait Co.* (Ga.), 18 R. R. R. 85, 41 Am. & Eng. R. Cas., N. S., 85.

¶See foot-notes appended to *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787.

**See foot-notes appended to *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787; foot-notes

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Same—Requisites of Agreement.††—If an alleged special agreement between a carrier and shipper, limiting the liability of carrier for loss of or injury to the goods, is in writing, it must be expressed in such manner as to be understood by a person of ordinary intelligence, and if not so expressed it must have been shown to have been explained to the shipper, so as to enable him to understand it.

Same—Injury to Goods—Injury after Transit.—In an action against a carrier for damages to property, plaintiff could not recover for any injury to the property or depreciation in its value after it had arrived at its destination and he had refused to accept it.

Action by Berte E. Carpenter against the Baltimore & Ohio Railroad Company. Judgment for plaintiff.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Horace G. Knowles, for plaintiff.

Andrew E. Sanborn and *John W. Huxley*, for defendant.

SPRUANCE, J. (charging the jury). This action is brought by the plaintiff, Berte E. Carpenter, against the defendant, the Baltimore & Ohio Railroad Company, a corporation of the state of Maryland, to recover damages for the alleged injury or destruction, through the negligence of the defendant company, of a piano shipped by the Piedmont Feed & Ice Company acting as the plaintiff's agent, from Piedmont, W. Va., to the plaintiff, in Wilmington, Del. It is not disputed that the piano, with certain other articles of household furniture, numbering in all over 80 pieces, was shipped as aforesaid on November 12, 1902, and that at the time of said shipment a bill of lading or shipping receipt was delivered by the defendant company to said ice and coal company, which was afterwards transmitted by mail by said last-mentioned company to the plaintiff in Wilmington, and that the plaintiff in Wilmington on November 24, 1902, paid to the defendant the freight on said shipment amounting to \$19.50. The plaintiff claims that the said piano was properly cased and placed in a car of the defendant company at Piedmont, and that at the time of its shipment it was in good condition, and that upon its arrival in Wilmington it was found to be so broken and injured as to be of no value, and he therefore refused to accept or receive the same, and he now claims as his damages the sum of \$270.

appended to *Kibby v. Michigan Cent. R. Co.* (Mich.), 19 R. R. R. 757, 42 Am. & Eng. R. Cas., N. S., 757; *Kansas City, etc., R. Co. v. Heard* (Miss.), 19 R. R. R. 755, 42 Am. & Eng. R. Cas., N. S., 755; foot-notes appended to *Michaels v. Adams Express Co.* (N. J.), 19 R. R. R. 341, 42 Am. & Eng. R. Cas., N. S., 341; foot-notes appended to *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88.

††For the authorities in this series on the question whether the shipper's mere acceptance of a contract of shipment includes his assent to its terms, see foot-notes appended to *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787; foot-notes appended to *Frasier v. Charleston & W. C. Ry. Co.* (S. Car.), 19 R. R. R. 768, 42 Am. & Eng. R. Cas., N. S., 768; foot-notes appended to *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88.

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It is admitted that the defendant company is, and was at the time of said shipment, a common carrier. "A common carrier is one who undertakes and exercises, as a public employment, the transportation or carriage of goods for persons generally, from place to place, whether by land or by water, and to deliver them at the place appointed, for hire or reward, and with or without a special agreement as to price." *McHenry v. P., W. & B. R. R. Co.*, 4 Har. 448. "A common carrier is bound to exercise the strictest care, and to deliver safely at their place of destination the goods entrusted to him. He is regarded by the law in the light of an insurer; and, in case goods are injured, lost, or destroyed, nothing will excuse or discharge him but the act of God or of the public enemies. By the act of God is meant such inevitable accident as cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning and tempest, floods, inundation," etc. "This rule of the common law has been spoken of as severe and rigorous; but, like most of the principles of the common law, it is founded in wisdom and dictated by sound policy. The exigencies of society require the adoption of the rule. Men engaged in the various business transactions of life are obliged from necessity to entrust common carriers with their goods. If such carriers are to be excused from all loss, destruction of, or injury to goods, in case it be shown that they have used due care, precaution, or attention, the party employing them could never show the want of such care, unless he had an agent to accompany his goods during the whole time occupied in their transportation. The carrier might at all times by fraud and collusion, or by means of his own agents or servants, throw the burden of proof upon the owner or consignee of goods, by making out a statement of facts, which, although untrue in itself, would show the exercise of ordinary care and diligence. Therefore, in actions against common carriers, founded on their ordinary liability for the loss of goods, the inquiry is, not whether the carrier has used due care or been guilty of negligence, but whether he can show that the loss happened by inevitable accident or by public enemies." *McHenry v. P., W. & B. R. R. Co.*, 4 Har. 449; *Pennewill v. Cullen*, 5 Har. 241; *Reed v. P., W. & B. R. R. Co.*, 3 *Houst.* 206; *Klair v. Wilm. Steamboat Co.*, 4 *Pennewill* 53, 54 *Atl.* 694.

The above-stated rule of law as to the liability of the carrier is subject to certain qualifications, as, for example, the carrier is not held responsible for loss or injury occasioned by bad or imperfect packing or other carelessness or negligence of the shipper, or for ordinary wear and tear and chafing of the goods in the course of their transportation, or for their ordinary loss of deterioration in quantity or quality, or for any inherent natural infirmity or tendency to damage, depreciation, or decay, etc. *Traux v. P., W. & B. R. R. Co.*, 3 *Houst.* 245; *Klair v. Wilmington Steamboat Co.*, 4 *Pennewill* 52, 54 *Atl.* 694. Where goods are injured during transportation, under such circum-

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stances as to render the common carrier liable, the measure of damages is the difference between the value of the goods in their damaged state and what would have been their value if delivered in good order, unless there was a special agreement between the parties fixing some other mode for the ascertainment of such damages. Where there is a contract fairly made between the shipper and the common carrier, whereby, in consideration of a reduced rate of freight, it is agreed that in case of loss or injury the carrier shall be liable only to the extent of an agreed valuation of the goods, such contract is valid and will operate as a limitation upon the liability of the carrier. *Hart v. Penna. R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Balto. & Ohio R. R. Co. v. Doyle* (United States Circuit Court of Appeals for Third Circuit, March Term, 1904) 142 Fed. 669.

It is claimed by the defendant company that such a contract was made between it and the shipper, whereby its liability was limited to \$5 per 100 pounds of the goods transported by it, and as the weight of the piano was proved to be about 800 pounds, the defendant claims that the plaintiff cannot in any event recover more than \$40. The plaintiff denies that there was any contract or agreement, express or implied, between the shipper and the railroad company touching the reduction of the valuation of the goods or the liability of the company in case of loss or injury; and he insists that the only special agreement between the shipper and the company touching said goods was that they should go by the local or slow freight line, on which the freight charge was less than on the through or fast freight line. If a special contract was made between the shipper and the defendant, whereby the liability of the latter was limited in amount, as claimed by it, then the plaintiff would not be entitled to recover damages exceeding \$5 per 100 pounds weight of the property injured or destroyed, with interest.

Upon the face of the said bill of lading or shipping receipt is the following written in ink: "Rel Val 500 per cwt." It is upon this that the defendant chiefly, if not entirely, relies to prove said special contract or agreement. The defendant claims that the acceptance by the shipper of the said bill of lading so marked was of itself a consent or agreement on his part to limit the liability of the defendant as above stated. A common carrier cannot relieve himself of any portion of his common-law liability for the loss or destruction of property carried by him, unless by express or implied contract with the shipper. Whenever a common carrier claims that he has by special agreement been released by the shipper from the operation of the before-mentioned common-law rule for the ascertainment of damages in case of loss or injury to goods transported, it is incumbent on the carrier to prove such special agreement to the satisfaction of the jury, and upon failure so to do the said common-law rule prevails. If such alleged special agreement is in writing, it must be expressed in such manner and form as to be understood by a per-

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son of average intelligence; or, if not so expressed, it must be shown to have been explained to the person to be bound, unless such person himself had such knowledge of the subject as would enable him to understand the meaning of the writing. "Save under very exceptional circumstances, before a shipper can be bound by a condition or regulation in the bill of lading limiting liability of which he has not actual knowledge, it must positively and particularly be brought to his attention." *Balto. & Ohio R. Co. v. Doyle*, *supra*, citing *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039, and *Calderon v. Atlas S. S. Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033.

We submit for your determination the question whether the shipper understood and agreed to the reduction of the carrier's liability as claimed by it, and in so doing you should take into consideration the said bill of lading and the said memorandum thereon, and also all the other evidence before you bearing upon the question. There can be no recovery in this action for any injury to or depreciation in the value of the piano after its arrival in Wilmington and the refusal of the plaintiff to accept it. If your verdict should be for the plaintiff, you may allow interest on the amount you assess as the damages of the plaintiff from the time the piano arrived in Wilmington and was tendered to the plaintiff.

Verdict for plaintiff for \$270.

CHICAGO, R. I. & P. RY. CO. *v.* FERGUSON.

(Supreme Court of Kansas, July 6, 1906.)

[86 Pac. Rep. 471.]

Carriers—Injury to Passengers.—Even if it be contributory negligence for a passenger to ride within the vestibule of a coach in a railway train, which we do not decide, the reckless pushing or jostling of a passenger by a train porter which causes the passenger to fall through an opening in the vestibule and off the train is negligence which renders the railroad company liable for damages resulting from such fall.

(Syllabus by the Court.)

Error from District Court, Smith County; R. M. Pickler, Judge.

Action by Joseph Ferguson against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error entered a passenger train of the plaintiff in error, at Esbon, Jewell county, to ride as a passenger, having procured a ticket for his passage to Lebanon, the next station, about six miles west. The stations at both Esbon and Lebanon are on the north side of the main track. At Mankato, several miles to the east of Esbon, is the nearest station which is upon the south side of the main track. There were only two

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day coaches, designed for the carrying of passengers, in the train. The seats in these two coaches were all occupied, and some passengers were standing in the aisles when the defendant in error with several other passengers entered the train. The platforms to both the chair car and the smoker were vestibuled, and while riding from Esbon to Lebanon the defendant in error and several other passengers stood on the platform in the vestibule between the two coaches, the defendant in error leaning against the end of the smoking car at the side of the door to that coach. As the train approached quite near to the station of Lebanon, a train porter, in discharging his duty to assist passengers preparing to leave the train, picked up a grip and jostled against the defendant in error, threw him out of his balance, and caused him to fall from the train, through the open vestibule at the end of the smoker on the south side, from which fall he received the injuries complained of.

The jury returned the following questions and answers, upon which the plaintiff in error claims that it is entitled to a reversal of the judgment in this case, to wit: "(10) Was there room on the chair car and in the smoking car for a person to sit or stand in this train while going from Esbon to Lebanon? Ans. Yes. (11) Could not the plaintiff have stood in the chair car or smoking car on this train, while going from Esbon to Lebanon? Ans. Yes. (12) Could not the plaintiff have seen, if he had looked, that the vestibule door was open, if it was open, on the south side, where he was standing, at the time the train was nearing Lebanon? Ans. Yes."

M. A. Low, W. F. Evans, and Paul E. Walker, for plaintiff in error.

D. M. Relihan and J. T. Reed, for defendant in error.

SMITH, J. (after stating the facts). We do not think these facts entitle the plaintiff in error to a reversal of the judgment. While the plaintiff below might have seen, if he had looked, that the vestibule door was open, he had no reason to suspect that it was open. It was the duty of the trainmen to keep it closed between stations, and he had a right to rely upon their performance of the duty. The evidence is that the plaintiff did not, in fact, see that the door was open. On the other hand, it was the duty of the porter to know whether or not the door was open, and he is conclusively presumed to have acted with the knowledge he should have possessed.

The jury was justified in believing from the evidence that the porter, knowing the door was open, recklessly pushed or jostled the plaintiff and caused him to fall through the door and off the train. If so, the negligence of the porter was the proximate cause of the resulting injuries, and if, as the defendant below contends, the plaintiff was guilty of negligence in riding within the vestibule instead of within a coach, which we do not decide, it is still liable for such negligence of the porter.

The judgment of the district court is affirmed. All the Justices concurring.

ILLINOIS CENT. R. CO. *v.* PORTER.

(Supreme Court of Tennessee, June 19, 1906.)

[94 S. W. Rep. 666.]

Carriers—Passengers—Railway Postal Clerk as Passenger.*—A railway postal clerk, in the discharge of his duties on a railroad, is a passenger.

Same—Injury to Passenger—Negligence—Prima Facie Proof.†—A passenger, suing for injuries, establishes a prima facie case of negligence by showing the derailment of the train and the consequent injury.

Same—Presumption of Negligence—Right to Rebut.‡—The presumption of negligence on the part of a carrier, arising from the proof of an injury to a passenger in consequence of the derailment of the train, may be rebutted.

Appeal—Verdict—Review.—The court, on reviewing a verdict based on conflicting evidence, is bound to accept the testimony of the successful party on all controverted questions of fact.

Carriers—Injuries to Passengers—Negligence—Speed of Train.‡—The fact that a train is running at a high rate of speed is not negligence, where the condition of the track and roadbed and the character of the engine and equipment are such that that speed may be safely maintained.

Same—Negligence—Question for Jury.—Evidence in an action against a carrier for injuries sustained by a passenger in consequence of the derailment of the train examined, and held to support a verdict of negligence on the part of the carrier.

Damages—Personal Injury—Measure of Damages—Impairment of Earning Capacity—Deduction for Compensation Received.—The sal-

*For the authorities in this series on the question who are, and are not, passengers, see foot-notes appended to *Conroy v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 384, 42 Am. & Eng. R. Cas., N. S., 384; foot-notes appended to *Chicago, etc., R. Co. v. Troyee* (Neb.), 19 R. R. R. 350, 42 Am. & Eng. R. Cas., N. S., 350; *Robertson v. Boston & N. St. Ry. Co.* (Mass.), 19 R. R. R. 123, 42 Am. & Eng. R. Cas., N. S., 123; foot-notes appended to *Chicago Union Traction Co. v. O'Brien* (Ill.), 19 R. R. R. 95, 42 Am. & Eng. R. Cas., N. S., 95; *McDonald v. Central R. Co.* (N. J.), 19 R. R. R. 58, 42 Am. & Eng. R. Cas., N. S., 58; foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

†For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises from the fact that one of its passengers is injured, see foot-notes appended to *Graf v. West Jersey & S. R. Co.* (N. J.), 19 R. R. R. 796, 42 Am. & Eng. R. Cas., N. S., 796; foot-note appended to *Kansas City, etc., R. Co. v. Nichols* (Miss.), 19 R. R. R. 330, 42 Am. & Eng. R. Cas., N. S., 330; foot-notes appended to *Firebaugh v. Seattle Elec. Co.* (Wash.), 19 R. R. R. 107, 42 Am. & Eng. R. Cas., N. S., 107; *Omaha St. Ry. Co. v. Boesen* (Neb.), 19 R. R. R. 100, 42 Am. & Eng. R. Cas., N. S., 100; *Louisville & N. R. Co. v. Board* (Ky.), 19 R. R. R. 51, 42 Am. & Eng. R. Cas., N. S., 51; *Paul v. Salt Lake City R. Co.* (Utah), 19 R. R. R. 45, 42 Am. & Eng. R. Cas., N. S., 45.

‡See foot-note appended to *Chicago, etc., Ry. Co. v. Wheeler* (Kan.), 18 R. R. R. 145, 41 Am. & Eng. R. Cas., N. S., 145; *State v. United Rys. & Elec. Co.* (Md.), 17 R. R. R. 624, 40 Am. & Eng. R. Cas., N. S., 624; foot-notes appended to *Chicago & W. I. R. Co. v. Newell* (Ill.), 15 R. R. R. 706, 38 Am. & Eng. R. Cas., N. S., 706.

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ary received by a railway mail clerk during the time he was incapacitated for work by reason of a personal injury inflicted by the negligence of another, being a gratuity of the government, cannot be considered in determining the damages in consequence of the injury.

Error to Circuit Court, Shelby County; Walter Malone, Judge.

Action by Reese Porter against the Illinois Central Railroad Company. There was a judgment for plaintiff, and defendant brings error: Affirmed.

J. H. Watson, for plaintiff in error.

Tim E. Cooper, Charles N. Burch, and Albert W. Biggs, for defendant in error.

MCALISTER, J. The plaintiff below was in the employment of the United States in the capacity of a mail clerk, and was assigned to duty on a fast passenger and mail train known as the "Chicago and New Orleans Limited." On the 20th of October, 1904, he sustained serious personal injuries in consequence of the derailment of the train at or near the village of Tillatoba, Miss. There was a verdict and judgment in favor of the plaintiff below for the sum of \$2,500, from which the company appealed and has assigned errors.

The first assignment is that there is no evidence to support the verdict of the jury. It is conceded by learned counsel on the brief that the derailment of a train, inflicting injuries upon a passenger, makes out a prima facie case of liability, and devolves upon the company the burden of proof that the accident was unavoidable, even by the exercise on its part of the utmost degree of care, skill, and foresight. But his contention is that the plaintiff in error adduced evidence conclusively showing that the accident was unavoidable, and not the result of any negligence or want of care, skill, or foresight upon the part of the company, its servants, and agents. The contention of learned counsel is that the accident was not caused by the high rate of speed at which the train was being operated, but by reason and on account of some latent defect, which caused the rear wheels of the tender of the second engine to leave the track; but just what this defect was it has been impossible to determine, etc.

The record reveals that at the time of the accident the train, consisting of 14 coaches, drawn by two engines, was running at a rate of 70 miles an hour. The train in question was operated as a fast mail and passenger train, and was especially designed to carry with the utmost expedition the United States mail between the points designated.

The cause of the accident does not distinctly appear from the record. The evidence submitted on behalf of the company indicated that the track was in good condition, that the engines, cars, and equipment of the train were in good order, and that the employees of the company at the time of the accident were in the exercise of proper care. The superintendent of the de-

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fendant company arrived on the scene of the accident about an hour after it occurred, and states that when he arrived he found a part of the train in a ditch. There were two cars on one side of the track badly derailed, and one of them turned bottom side up; on the other side there was another, badly derailed. There were several cars off the track. "My recollection is five or six cars were standing on the track that were not derailed." The first manifest evidence of the derailment showed itself at a point about 30 feet south of the north switch and extended for a distance of 2,500 feet to the point where the cars were ditched. The indentations on the ties showed that one pair of wheels had first left the track, and a little further on the truck left the track, and then a little further on the truck slued around, and the cars already described then became derailed. According to the witness, two wheels of the front truck of the tender on the second engine first left the track, which was soon followed by the truck itself, and then the truck turned around and caused a derailment of the cars.

It further appears from the record that the accident happened on what is known as a "reverse curve," and it is insisted that it was gross negligence on the part of the company to operate its trains at such a high rate of speed on a curve of that character. The superintendent testified that this is a 3-degree curve, or a divergence from a tangent to 3 degrees of a circle of 360 degrees; that it was not much of a curve; that it was a reverse; that it runs from the obverse side at a tangent onto the reverse side; that it is not a stiff curve by any means.

The plaintiff testified that from his experience in the service the train was running at not less than 70 miles an hour, and that the train was nearly two hours late; that his attention was directed to the speed of the train before it left the track; that he was working at the letter case; train was running at such a rate of speed on the reverse curve that he could hardly strike the letter box, working the letters. Plaintiff testified that he had never seen the train make such speed as that over a reverse curve like that at Tillatoba. He further testified that it was an unusually sharp curve and downgrade; that it is an unusually sharp curve, and there is no downgrade worse than that on the road. The witness further testified that he had never known the train to run so fast at that point before; that he had known it to run as fast as that on straight stretches of track, but never that fast at that point.

It should have been stated that at the time of the accident the train was proceeding south towards New Orleans.

The plaintiff's testimony as to his injuries was as follows: "One bone in my left arm was broken—that was the principal surface injury at the time—and I had wounds, one on my cheek, another over my eye, several cuts and bruises on my head, and then a severe bruise and abrasion on my left hip and on each knee, and then another about half way down between the knee and the ankle, and a number of small cuts and bruises all over

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the surface of my body. The car was reduced to splinters almost, and a number of them were imbedded in my flesh. I was disabled for a period of five months."

Plaintiff further testified that prior to the accident he enjoyed unusually good health and had never lost any time from sickness, but that since the accident it had been very different; that he had fallen off in weight and suffered a great deal from sleeplessness; that sometimes he would only sleep an hour or two in a night, unless he was under the influence of an opiate. At the time of the accident he was in Class 4A, and getting a salary of \$1,200 a year.

It should have been stated that the superintendent of the road also testified that this train was scheduled at 39 miles an hour, including stops, and that at the time of the accident it was behind time. This witness further testified that the company did not limit its men in speed on these trains. "If a train is late, we have confidence in our enginemen, and we say to them: 'Make up as much of that time as in your judgment you consider entirely safe.'"

It is well settled that a railway postal clerk in the discharge of his duties on a railway train occupies the relation of a passenger, and his rights are to be determined by the rules of law applicable to that relation. *B. & O. R. R. Co. v. State* (Md.) 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454; *Arrowsmith v. Railroad Co.* (C. C.) 57 Fed. 165; *N. Y., etc., R. R. Co. v. Seybolt*, 18 Am. & Eng. Ry. Cas. 162 (95 N. Y. 562); *Gleeson v. Va. Midland R. R.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458.

In *Railway v. Kuhn*, 107 Tenn. 112, 64 S. W. 203, it was said: "All the law required of the plaintiff in the first instance was to show that the defendant was a common carrier, that he was its lawful passenger, and that the injury sued for was caused by the derailment and overturning of the coach in which he was traveling. That, without more, was sufficient to constitute a prima facie case of actionable negligence on the part of the defendant; and to rebut the presumption of negligence arising from proof of these facts it was incumbent on the defendant to prove that it had done all within its power to avoid a disaster of that kind." The presumption is not conclusive, however, but may be rebutted by showing that the injury arose from an unavoidable accident, or an occurrence which could not have been prevented by the highest applicable degree of care and foresight.

The uncontradicted evidence on the record is that at the time the train was derailed it was running over a reverse curve at a speed of 70 miles an hour. It is true liability cannot be based simply upon the rate of speed. As said by Mr. Elliott, in his work on Railroads (volume 4, § 1589), as follows: "The speed at which trains are run is, as a general rule, a matter to be determined by the railroad company; and where there is no statute

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or municipal ordinance, it is very seldom indeed that a charge of negligence can be successfully maintained upon evidence that the rate of speed was very great." There may, however, be peculiar circumstances involved in a particular case which will justify the conclusion that there was negligence in running at a high rate of speed; but it would require peculiar circumstances or conditions to make the rate of speed an element of negligence. *Railroad Co. v. Winters*, 85 Tenn. 240, 1 S. W. 790; *Railroad Co. v. Milam*, 9 Lea, 223; *Fitch v. Railroad Co.*, 3 Tenn. Cas. 676.

The proof shows that the defendant company was accustomed to run this train at the rate of 70 miles an hour over that portion of its road, and that the exigencies of its business in the carriage of its passengers and the transmission of the government mail required the highest speed attainable within the limits of reasonable prudence and safety. The company in this case has offered no explanation of the derailment of its train, but has sought to counteract the presumption of negligence arising from the accident by proof that it had exercised proper care in the selection of its employees, that its road was in good order, and that its equipment was perfect. It further offered evidence tending to show a very efficient system of inspection both of its roadbed and track, as well as of its engines, cars, and running gear.

The question still remains whether the company exercised reasonable prudence in operating its train at such a high rate of speed at the particular locality where the accident happened. The testimony of the plaintiff is to the effect that the place of the accident was on a sharp reverse curve, and down an unusually steep grade; further, that during his service as postal clerk he had never known a train to make such a high rate of speed at that particular locality; and that on this occasion the train was two hours late. While the testimony of the railroad company is that this reverse curve was only 3 degrees, and was therefore very slight, we are compelled to take the testimony of the plaintiff on all controverted questions of fact, since the verdict of the jury has determined them in his favor.

The trial court properly instructed the jury: "The mere fact that a train is running at a fast rate of speed is not negligence, if the condition of track and roadbed, and the character of the engine and equipment, are such that that speed may be safely maintained." But we think, upon the facts stated, there is evidence to support the finding of the jury fixing the negligence upon the defendant company.

The second assignment of error is that the trial judge erred in declining to permit the company to show that the defendant in error did not lose any time and was paid his salary in full during the time of his disability. In this connection we will consider the third assignment of error, to the effect that the court erred in submitting to the jury the loss of time, since he had declined to permit the plaintiff in error to show that no time had been lost. The plaintiff below alleged in his declaration, not only that he

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had suffered great pain, both mental and physical, but that he was hindered and prevented from transacting and attending to his necessary and lawful affairs and business during all that time, and was deprived of great gain, profits, and advantages which he might otherwise have acquired. On the trial of the cause the plaintiff was permitted to testify that at the time of the accident he was earning a salary of \$1,200 a year, or at the rate of \$100 per month, and by reason of the accident he was disabled five months, losing that much time. On cross-examination counsel for the company endeavored to show that defendant in error had lost nothing by reason of his disability, but that his salary had been continued by the United States. This question was objected to, and the objection sustained by the court. If the witness had been permitted to answer, he would have stated that during the time he was disabled his salary was paid at the rate of \$100 per month. It is insisted on behalf of the company that the trial judge was in error in declining to permit this evidence to go to the jury, and that this error was intensified by the instruction by the trial judge in his charge to the jury on this subject, as follows: "You should take into consideration, and it is your duty to do so, the age of this plaintiff, the state of his health before the accident, the state of his health after the accident; take into consideration his loss of time, if any; take into consideration his earning capacity before and after the casualty."

It is insisted very earnestly on behalf of the company that the exclusion of this evidence by the trial judge was erroneous. The insistence of counsel is that under the rule of this court, except in cases where the assessment of exemplary damages is permissible, the true rule is compensation. In other words, the object of the law is to make the plaintiff whole, and if he has lost nothing in a pecuniary sense, from his disability, he is not entitled to damages for loss of time.

In support of this contention, counsel insists that the courts of Alabama, New York, Kentucky, Missouri, Delaware, and Pennsylvania have announced the rule that where an employee has been injured, and it appears that his employer has continued the payment of his wages, not in pursuance of any obligation of the contract, but as a mere gratuity, in such case the injured employee will not be entitled to recover from the wrongdoer damages for loss of time. *Drinkwater v. Dinsmore*, 80 N. Y. 390, 36 Am. Rep. 624; *Montgomery R. R. Co. v. Mallette*, 92 Ala. 210, 9 South. 363; *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375; *Ephland v. Railroad Co.*, 57 Mo. App. 147.

The cases of *Railroad Co. v. Mallette*, 92 Ala. 210, 9 South. 363, *Drinkwater v. Dinsmore*, 80 N. Y. 391, 36 Am. Rep. 624, and *Goodhart v. Railroad Co.*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705, hold that such evidence is admissible, since the plaintiff, in order to recover for the loss of wages, is bound to show that he lost his wages in consequence of the injuries. We think, however, the sounder doctrine is laid down by the Supreme Court of Georgia in *N. C. & St. L. Ry. Co. v. Miller*, decided June 10,

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1904, and reported in 47 S. E. 959, 67 L. R. A. 87. The facts of that case present a striking analogy to the case at bar, wherein a railroad mail clerk was injured in a collision of two of the defendant's trains. Mr. Justice Cobb, who delivered the opinion of the court, said:

"Error is assigned upon the following charge: 'It is immaterial whether the government paid the plaintiff anything or not. That would not affect the right of the plaintiff in this case to recover against the railroad company.' Error is further assigned upon the refusal of the judge to give in the charge a written request, which was as follows: 'Plaintiff admits in his testimony that he received from the government his regular salary during the time he did not work on account of his injury. This being so, I charge you that he cannot recover anything for the time lost, as claimed in his declaration.' "

"King, an assistant division railway mail superintendent, testified as follows: 'Plaintiff returned to work about June 10, 1903, about the time the year ended. If he had not gone back to work, he would have been granted further time, but his pay would have stopped. The government pays them for one year when they are disabled for work. This is done on the physician's certificate, for no period longer than sixty days consecutively, and not to exceed one year in total.' * * * While the statute for regulation of the post-office department under which this payment was made does not appear in the record, nor is it cited on the briefs of counsel, the payment was evidently made under the provisions of section 1424 of the Postal Laws and Regulations, which read as follows: 'Whenever a railway postal clerk shall be disabled, while in the actual discharge of his duties, by a railroad or other accident, beyond his power to control, he shall send to the division superintendent a certificate of his attending physician, or surgeon, sworn to before an officer authorized to administer oaths, who has an official seal, setting forth the nature, extent, and cause of his disability and the probable duration of the same, and such further evidence as to the character of the disability as may be necessary shall be furnished. The division superintendent will forward the certificate, with his recommendation, to the general superintendent of the railway mail service, who will submit the matter to the Postmaster General, who may, in his judgment, the facts justifying such action, grant such disabled clerk leave of absence with pay for periods of not exceeding sixty days each, and not exceeding one year in all.'

"In considering whether the assignments of error under consideration are well taken, it is necessary to determine whether the payment referred to in the testimony was of such a character as to preclude the plaintiff from claiming compensation for lost time against the railway company. When one engaged in any calling or avocation from which he derives a pecuniary benefit is compelled to give up for a time the performance of his duties as the result of an injury inflicted upon him by a wrongdoer, he is entitled, as a general rule, to demand compensation for the

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time thus lost at the hands of the wrongdoer who inflicted the injury. The general rule is that, where a wrongdoer causes time to be lost, he will not be heard to say that the person injured has suffered no pecuniary loss because he has received, as the result of being injured, contributions which in amount aggregate more than what would have been earned during the time. Nor will his liability be diminished to the extent of contributions which were less than what would have been earned. * * *

"We think the view taken by Mr. Watson, and which seems also to be concurred in by Mr. Sutherland and Mr. Rorer, is sounder than that which appears to be approved by the other text-writers. The wrongdoer may show in defense to a claim for lost time that no time has been lost; and this, of course, is right and just, because, if no time has been lost, no compensation is due from anybody on account of lost time. But, if time has been lost as the result of a tort, sound sense, common justice, and, it may be, public policy, would demand that the tort-feasor be prohibited from making a defense founded upon the proposition that he has been guilty of a wrong—it may be a grievous and outrageous wrong—that some third person, not only not in sympathy with the wrongdoer, but despising him and his act, has from some unworthy motive paid to the injured person an amount which, if it came from the wrongdoer, would have equaled the damages which would have been assessed against him. There is nothing in the record to show that the government, in its contract of employment with railway mail clerks, stipulates for the payment of salary during the periods of disability, and, so far as the record discloses, when such an employee is disabled from work, he cannot, as a matter of right, demand anything from the government by way of compensation during the period of disability. There is nothing in the testimony of the witness King to indicate that payments are made in such cases otherwise than as a matter of grace. If we look at the postal laws and regulations above quoted, it is perfectly clear that the payment is a mere gratuity on the part of the government. We are, therefore, not confronted in the present case with the necessity of deciding the question as to what would be the rule in the event that the injured employee, under his contract of employment, had a right to demand of his employer the amount which he would have earned as wages during the period he was disabled. On this question we make no ruling; but we do rule that, where an employer pays to an injured employee as a matter of grace the amount which he would have earned as wages if he had not been disabled, a wrongdoer who brings about the disability has no concern with this transaction between the employer and the employee, and the amount so paid is not to be regarded as in any sense compensation for lost time."

Mr. Watson, in his work on Damages for Personal Injuries, after citing cases holding against the right to recover for loss of time where wages have been paid, says: "On the other hand, there is authority for the position that the fact that the employer

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did not deduct the plaintiff's salary during the time he was disabled does not affect the plaintiff's right of recovery for the value of his time. This is unquestionably the sounder view. The tort-feasor has no right to invoke in his own defense the liberality of the plaintiff's employer, whose course in this respect is especially for the benefit of the injured party, and not for that of the author of the wrong. Certain it is, finally, that few employers would continue the salary of a valued employee during a term of incapacity from injuries if the effect of this was merely to relieve pro tanto the party liable in damages for the tort."

N. C. & St. L. R. R. Co. v. Miller, *supra*, in our opinion, announces the correct doctrine and is sustained by the unquestionable weight of authority. It is further in accord with the well-settled rule that money received on accident insurance policies by the injured persons does not diminish the amount of recovery against the wrongdoer. M., K. & T. R. R. Co. v. Rains (Tex. Civ. App.) 40 S. W. 635; M., K. & T. R. R. Co. v. Flood (Tex. Civ. App.) 79 S. W. 1106; Carroll v. Mo. Pac. R. Co., 88 Mo. 239, 57 Am. Rep. 382; L. & N. R. R. Co. v. Carothers, 23 Ky. Law Rep. 1673, 65 S. W. 833, 66 S. W. 385; Pittsburg. C. & St. L. R. R. Co. v. Thompson, 56 Ill. 138; Baltimore City Pass. R. R. Co. v. Baer, 90 Md. 97, 44 Atl. 992.

In *Regan v. N. Y. R. R. Co.*, 60 Conn. 134, 22 Atl. 504, 25 Am. St. Rep. 306, the court said: "If the defendant is entitled to have the insurance money deducted from the amount otherwise due, it must be because it owns or has some legal claim to the money. How happens it that the defendant is entitled to this money? Not because it ever paid the premium or any part of it, nor because the policy was intended for its benefit, nor upon its request, nor because there is any privity between it and the insurance company. * * * How, then, can the defendant claim, as it does, the exclusive benefit of the insurance? It came to the plaintiff from a collateral source, wholly independent of the defendant, and which as to him was *res inter alios acta*. The defendant in my judgment has no more claim to the insurance money than it would have to money obtained upon a subscription paper that the friends of Regan (the property owner) may have procured to make good his loss."

Harding v. Townshend, 43 Vt. 536, 5 Am. Rep. 304, was an action to recover damages for personal injuries received in consequence of a defect in a highway, and the defendant sought to have the recovery credited by the amount of indemnity received on an accident insurance policy. The court said: "There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense or inure to the benefit of the defendant. The insurer and the defendant are not joint tort-feasors or joint debtors, so as to make a payment or suit by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter.

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The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and the third person, the insurer, to which the defendant was in no measure privy, either by relation to the parties, or by contract, or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit."

The trial judge, in passing on the question of evidence raised in the court below, followed the ruling in *N. C. & St. L. R. R. Co. v. Miller*, supra, stating, however, that in that case the question was reserved whether the deduction will be made where the money paid by the employer is part of the contract with the person entering the employment. The trial judge was of opinion that the wages paid in the present case by the government was a mere gratuity, and regulated by section 1424 of the postal laws, which was as follows: "That section, after setting out the course to be taken by an employee who has been injured in taking out a certificate with regard to his injuries, provides: 'The division superintendent will forward the certificate with his recommendation to the general superintendent of the railway mail service, who will submit the matter to the Postmaster General, who may, in his judgment, the facts justifying such action, grant such disabled clerk leave of absence, with pay, for periods of not exceeding sixty days, and not exceeding one year in all.'" The division superintendent has first to make his recommendation of that application, and then discretion is given the division superintendent whether he will recommend the claim or not. In addition to that, the Postmaster General may, in his judgment, or he may not, grant this application. It is a matter left ultimately to the discretion of the Postmaster General. The court, therefore, was of opinion that this is a gratuity on the part of the United States. It is a mere case of liberal dealing with its employees. It is not bound to pay this money, and it does it simply as a gratuity, not as a part of the contract, etc.

We entirely agree with the circuit judge in his disposition of this question of evidence.

It results that there is no error in the record, and the judgment is affirmed.

ANDERSON *v.* MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 2, May 22, 1906.)

[93 S. W. Rep. 294.]

Death—Carriers—Injuries to Passenger—Petition—Sufficiency.*— Under Rev. St. 1899, § 2864, providing in substance that, where any passenger dies from injury occasioned by the negligence and unskillfulness or criminal intent of any officer, agent, servant, or employee while managing any locomotive, cars, or train of cars, the owner of such railroad shall pay the sum of \$5,000, a petition averring that at a certain time plaintiff's husband was a passenger on defendant's railroad, and that, while his train was standing on defendant's track at a station, another train on the same track collided with it, wounding and bruising him, from the effects of which he died, and specifically alleging that the said cars at the time belonged to and were being managed by defendant's officers, agents, servants, and employees, and that the injury was occasioned by the negligence and unskillfulness of said officers, etc., whilst so managing such train and locomotive, was sufficient; it not being essential to allege the particular acts of any particular servant or employee which occasioned the collision.

Carriers—Passengers—Termination of Relation.†—A passenger who has purchased a ticket to a certain point, but who, on reaching such point, decides to go further, need not, in order to preserve his protection as a passenger, alight from the train and then re-enter, nor expressly notify the conductor of his purpose to continue his journey.

Same—Evidence—Presumption.—Where deceased, at the time of a collision, was in the coach used by defendant railroad for the purpose of transporting passengers, his residence being at a distant point where his family was, and the train having started to carry such passengers as were on to other points of destination along its line, the presumption was that deceased was lawfully in the coach.

Same—Positive Evidence—Submission to Jury.—Where, in an action against a railroad for wrongful death, it appeared that deceased, after reaching the point on defendant's line to which he had purchased a ticket, remained in the coach; that the residence of himself and family was at a station further along the road; and that, at the time of the collision causing his death, defendant's train had started—it was not essential, in order to authorize the submission of the case to the jury, to show by positive or direct evidence that deceased was a passenger at the time of the collision, or that it was his purpose to continue his journey.

Same—Instructions—Sufficiency.—Where, in an action against a railroad for wrongful death resulting from injuries received by deceased in a collision occurring after the train whereon he was a passenger had left the station to which he had purchased transportation, it was conceded that up to the time of reaching the station he

*For the authorities in this series on the question whether it is necessary for plaintiff, in an action against a railroad, to designate the employees guilty of the negligence alleged, see foot-notes appended to *South Georgia Ry. Co. v. Ryals* (Ga.), 18 R. R. R. 517, 41 Am. & Eng. R. Cas., N. S., 517; foot-notes appended to *Pierce v. Seaboard Air Line Ry.* (Ga.), 17 R. R. R. 575, 40 Am. & Eng. R. Cas., N. S., 575.

†For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

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was a passenger, an instruction, requiring the jury to find for plaintiff if they believed that deceased at the time of the accident was a passenger on defendant's train, and further charging that if they believed, from all the facts and circumstances in evidence, that deceased determined to continue his journey to the station whereat he resided, and remained on the train for that purpose, the fact that he had only paid his fare to the former station was no defense to the suit, sufficiently required the jury to find that deceased was a passenger at the time of the accident.

Death—Carriers—Injury to Passenger—Damages.—Rev. St. 1899, § 2864, provides that, where a passenger dies from an injury occasioned by the negligence and unskillfulness, etc., of any officer, agent, servant, or employee whilst running, conducting, or managing any locomotive, cars, or train of cars, the owner of such railroad shall forfeit the sum of \$5,000. In an action for wrongful death, the petition proceeded on the theory that deceased was a passenger on defendant's train, and that his death was occasioned by the negligence and unskillfulness of the agents, servants, and employees of defendant while so running, etc., such train of cars and locomotives, and the evidence showed that defendant's train was run into by another train, causing the injuries from which deceased died; that defendant's conductor sent the brakeman back with a flag for the purpose of signaling the following train, but there was no evidence that he did so signal the train. Held, that the court properly confined plaintiff's recovery to section 2864, as such brakeman was a servant engaged with others in operating and managing the train.

Appeal from Circuit Court, Cooper County; James E. Hazell, Judge.

Action by Cornelia Anderson against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

There was a verdict and judgment for the plaintiff in the Cooper county circuit court, and this cause is here upon appeal by defendant. The judgment in this cause is predicated upon the following acts of negligence complained of in the petition filed by plaintiff: Plaintiff states that she is the widow of Robert Anderson, deceased. That the defendant is and was at the time hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, and as such running and operating a railroad in said state through and from the city of Nelson, in Saline county, to the city of Blackwater, in Cooper county. That defendant in the operation of said railroad is and was at said time a common carrier of passengers for hire between said points. That on the 5th day of June, 1902, the said Robert Anderson entered into a passenger car of defendant on its said railroad at said city of Nelson, a station on said railroad, as a passenger for transportation over said railroad to said city of Blackwater, and as such passenger was lawfully in said car which was part of and situated at or near the rear of a train of cars attached to a locomotive headed east on said railroad. That while said Robert Anderson was a passenger on defendant's said train as aforesaid, and while said train and locomotive was standing on defendant's railroad track at said station of Nelson, another train of cars drawn by a loco-

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tive also headed east, and on the same railroad track as aforesaid, approached at high speed and ran into the rear end of and collided with the first above-mentioned train, upon which plaintiff's said husband was a passenger, with great force and violence, completely wrecking and demolishing the car in which the said Robert Anderson was situated, and wounding and bruising the said Robert Anderson, from the effect of which he then and there died. That the aforesaid car, train of cars, and locomotives at the time aforesaid belonged to and were being run, conducted, and managed by officers, agents, servants, and employees of the defendant, and the injury resulting in the death of the said Robert Anderson as aforesaid was occasioned by the negligence and unskillfulness of said officers, agents, servants, and employees whilst so running, conducting, and managing said car, trains of cars, and locomotives: Wherefore plaintiff has been damaged in the sum of \$5,000, for which, together with costs of suit, she prays judgment against defendant. The answer to this petition consists of a general denial, followed by a special denial of any negligence on the part of the agents and servants of defendants, and a statement that whatever injuries plaintiff's husband may have received were the result of and occasioned by pure accident, without negligence, on the part of the agents and servants of defendant.

The trial of this cause was had on the 29th day of January, 1903. There is practically no dispute as to what the testimony tended to prove in this cause. There is no controversy over the fact that Robert Anderson was plaintiff's husband, and there is no contention that the suit was not instituted within the statutory period; that is, six months after his death. The testimony upon the trial tended to establish substantially the following state of facts: That Robert Anderson resided at Blackwater, a town and station on defendant's railway; that he left Blackwater on the afternoon of June 5, 1902, on defendant's west-bound passenger train for the city and station of Marshall on said railway; that he reached Marshall, and later on the same afternoon took passage on another of defendant's trains returning east toward Blackwater, his home; that the latter train reached the station of Nelson between Marshall and Blackwater late on said afternoon; that the train (a mixed stock and passenger train) stopped at Nelson 25 or 30 minutes, loading and unloading freight, and taking on stock cars; that, immediately after this train at Nelson started on its journey toward Blackwater, it was run into in the rear by another train going in the same direction, resulting in a collision and a wreck of the passenger coach of the forward train; that after the wreck rescuers found Robert Anderson in the wrecked coach, badly mangled; and that he died a few minutes after his removal from the wreck. The conductor of the train deceased was on testified that the latter paid his fare from Marshall to Nelson. It was admitted by defendant at the trial that the railway and trains mentioned were the property of the defendant, that said trains at the time of the collision were

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being operated by defendant's servants, and that Robert Anderson died as the result of injuries caused by said wreck. The evidence further showed at the trial that Anderson was on a regular train, running several hours behind its schedule time at Nelson; that, according to the defendant's regulations, it was the duty of its servants operating said train, when it stopped at Nelson, to send a signal man to the rear, and by the use of a signal flag, and by placing torpedoes on the track, warn approaching trains of the presence of this train at Nelson. The conductor of the forward train testified that he sent a brakeman back with a flag for the purpose of signaling the following train, but there was no evidence that he did signal said train. The brakeman was not present to testify at the trial. The engineer of the rear train testified that he saw no flag and heard no torpedoes as he approached Nelson, and his testimony and that of witnesses for the plaintiff showed that a few yards west of the Nelson depot the railway makes a sharp curve through a deep cut, so that an engineer going east could not see a train at the depot until he approached very close.

At the close of the evidence the defendant requested the court to give an instruction in the nature of a demurrer to the evidence, which substantially told the jury that under the pleadings and all the evidence in the case the plaintiff was not entitled to recover, and the jury will find for the defendant. This request was denied, and the court refused to give the instruction.

At the request of the plaintiff, the court gave the following instructions:

"No. 1. The jury are instructed that, if they believe from the evidence that on or about June 5, 1902, Robert Anderson was a passenger on one of defendant's trains, and that in consequence of the negligence of the defendant's servants, agents, and employees whilst running, conducting, or managing said train of cars, another train of cars going in the same direction upon defendant's said railroad ran into and collided at the station of Nelson with the car in which said Anderson was, and he was thereby killed, and that said collision occurred and his death resulted from the carelessness and negligence of defendant's servants in running, conducting, or managing said train on which he had taken passage, or the train colliding therewith, and that plaintiff is his widow, and this suit was begun within six months after his death, they will find the issue for the plaintiff and assess her damages at the sum of \$5,000. Even if the jury should find from the evidence that Robert Anderson got on defendant's train at Marshall and only paid his fare to Nelson, still, if the jury believe from all the facts and circumstances in evidence that he determined to continue his journey to Blackwater and remained on said train for that purpose, the fact that he only paid his fare from Marshall to Nelson is no defense to this suit.

"No. 2. If the jury believes from all the evidence in the case that the death of Robert Anderson was the result of mere accident or misadventure, and that the same was not caused by any

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negligence on the part of defendant or its servants, then they must return a verdict for the defendant.”

The defendant requested the court to instruct the jury as follows:

“No. 1. If the jury find from the evidence that the accident by which plaintiff’s deceased husband was killed was not occasioned by, or did not result from, the negligence, unskillfulness, or criminal intent of any of the agents, servants, or employees of defendant, whilst running, conducting, or managing the locomotive and train of cars, which collided with the car on which her said husband was seated, or whilst running, conducting, or managing the locomotive and train of cars, on which her said husband was a passenger, but that such accident was caused and brought about by the rear brakeman of the train on which plaintiff’s deceased husband was a passenger, in failing to properly guard such train from being run into, by a train following it, then, if the jury find for the plaintiff, they are not bound to assess her damages at just the sum of \$5,000, no more nor less, but may assess the same at any sum not exceeding the sum of \$5,000. If the jury find for the plaintiff, then, in assessing her damage, they can only assess such damages at such sum as will compensate her for the pecuniary injury necessarily resulting to her from the death of her husband. The jury cannot allow her anything on account of any pain, sorrow, or mental anguish which she may have suffered on account of her said husband’s death. And in arriving at the pecuniary value of her husband’s life to her, they should take into consideration his age at the time of his death, and also the probable length of time that he may have lived after the date of his death; also his power, ability, and capacity to earn money, and acquire property at the time of his death; also his moral, social, and domestic habits. And if, after considering all these matters, under the evidence you should find that the pecuniary value of his life was worth nothing to the plaintiff, then your verdict will be for the defendant. But if, after considering all these matters, you should find that the pecuniary value of his life was worth something to plaintiff, then you will find for the plaintiff and assess her damages at such sum only as will, under all the evidence in the case, compensate her for the pecuniary loss which may have necessarily resulted from her husband’s death.

“No. 2. The court further instructs the jury that it is alleged in plaintiff’s petition as the ground work of her action that the plaintiff’s husband, Robert Anderson, was a passenger upon defendant’s train, at the time he received the injury which resulted in his death, and the burden of proving that he was such passenger is upon the plaintiff. And unless you believe and find from the preponderance of the evidence that he was, at the time he was killed, on board of the train, as such passenger, as herein-after defined, then the plaintiff cannot recover herein, and the jury will find for the defendant. And if the jury find from the evidence that plaintiff’s said husband had taken passage on its

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train at Marshall, Mo., and had paid his fare to said station of Nelson, and, after the arrival of said train at Nelson, he remained on board the train, talking to a friend, without notifying the conductor of said train that he wished to go further on said train, and that the conductor of said train did not know that he remained aboard said train after it arrived at Nelson, then the plaintiff's husband, Robert Anderson, was not a passenger on said train."

Which instructions so requested by the defendant were by the court refused, to which action of the court timely objections and exceptions were preserved. Whereupon the cause was submitted to the jury, and they returned a verdict finding the issues for the plaintiff and assessing her damages at the sum of \$5,000. Defendant within the proper time filed its motion for a new trial, which was by the court overruled. Judgment was entered in accordance with the verdict, and from this judgment defendant in due time and proper form prosecuted this appeal to this court, and the record is now before us for consideration.

Martin L. Clardy, Wm. S. Shirk, and John Cashman, for appellant.

W. G. & G. T. Pendleton and W. M. Williams, for respondent.

Fox, J. (after stating the facts). The record in this cause discloses numerous assignments of error on the part of appellant. We will treat of such complaints in the order suggested by the brief and give them such consideration as their importance merits and demands.

1. It is insisted that the petition in this cause is fatally defective, and that the court erred in refusing to sustain defendant's objection to the introduction of any evidence. This insistence is predicated upon the contention of the defendant that the averments in the petition of the negligence complained of is too general and do not meet the requirements of the law. We have carefully considered the petition upon which this proceeding is predicated, and we are unable to agree with learned counsel for appellant that this petition is fatally defective or fails to state a good cause of action. The recovery in this cause is sought under the provisions of section 2864, Rev. St. 1899, which substantially provides that, where any passenger shall die from any injury resulting from or occasioned by the negligence and unskillfulness or criminal intent of any officer, agent, servant, or employee whilst running, conducting, or managing any locomotive, cars, or train of cars, the owner of such railroad shall forfeit and pay for every passenger so dying the sum of \$5,000. Then follows the provisions of said section designating the persons who may sue for and recover such forfeiture. The petition in this case alleges with sufficient particularity every essential element necessary to support a recovery under the provisions of the section above cited. It expressly avers that at a certain time Robert Anderson, husband of the plaintiff, was a passenger for

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transportation over defendant's railroad, and that while said Robert Anderson was a passenger on defendant's train of cars, and whilst said train was standing on defendant's railroad track at the station of Nelson, another train of cars drawn by a locomotive also headed east, and on the same railroad track of defendant, approached at high speed and ran into the rear end of and collided with the first above-mentioned train upon which plaintiff's said husband was a passenger, with great force and violence, completely wrecking and demolishing the car in which the said Robert Anderson was situated, and wounding and bruising the said Robert Anderson, from the effects of which he then and there died. Then follows a specific allegation that the aforesaid cars, trains of cars, and locomotives at the time aforesaid belonged to and were being run, conducted, and managed by officers, agents, servants, and employees of the defendant, and the injury resulting in the death of said Robert Anderson aforesaid was occasioned by the negligence and unskillfulness of said officers, agents, servants, and employees whilst so running, conducting, and managing such cars, train of cars, and locomotives. We are unable to conceive, under the uniform rulings of this court, in what particulars the acts of negligence complained of should have been more specific. If plaintiff's husband was a passenger upon the train of cars of the defendant, then he was entitled to be safely transported to the point he purposed going, and if he was killed by reason of the train on which he was traveling being run into and wrecked by another of defendant's trains, and such collision was occasioned by the negligence or unskillfulness of the officers, servants, or employees in running, conducting, and managing said train, it was not essential to allege the particular acts of any particular servant or employee which occasioned the collision; but it is only necessary to allege generally the collision, and that such collision was occasioned by reason of the negligence and unskillfulness of those operating and managing the train, and that the injuries and death of plaintiff's husband was the result of such negligence and unskillfulness.

In view of the recent expressions of this court applicable to this subject, and the questions of pleading involved in the case at bar, we deem it unnecessary to burden this opinion with a review of all the authorities touching this proposition presented for consideration. In *Rinard v. Railway Co.*, 164 Mo. 270, 64 S. W. 124, a recovery was sought for the killing of plaintiff's husband, caused by a collision of two trains upon defendant's road near Galt in Grundy county, Mo. The collision of the two trains in that case was alleged in a very similar manner to the allegations of the collision of the case in hand, which was followed by a charge in the petition that the collision was the result of and occasioned by the negligence of the officers, agents, servants, and employees of defendant whilst running, conducting, and managing said locomotives, cars, and trains aforesaid. The sufficiency of the petition in that case was challenged, and such

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challenge was fully considered, and in treating of it this court thus stated the proposition and announced its conclusion upon the question presented: "It is next insisted that the motion to require the plaintiff to make each count of the petition more definite and certain, 'by specifying the officer, agent, servant or employee of defendant whose alleged negligence occasioned the death of plaintiff's husband, and also by specifying in what respect and upon what particular train such officer, agent, servant or employee was negligent,' should have been sustained. In *Gurley v. Railroad*, 93 Mo. 445, 6 S. W. 218, Black, J., delivering the opinion of this court, held that 'the acts done or omitted, which constitute the negligence complained of, should be stated with a reasonable degree of particularity.' And in *Sullivan v. Railroad*, 97 Mo., loc. cit. 117, 10 S. W. 852, it was insisted that the petition was bad under the rule laid down in the *Gurley Case*, but the same learned judge said: 'The rule of that case is that it is good and sufficient pleading to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done. In this case the petition sets out the circumstances as a matter of inducement, to the unnecessary extent of stating the names of the conductor and engineer in charge of the train. It states that Sullivan was run upon and killed by the designated train, and that his death was occasioned by the negligence of the defendant's servants while running, conducting, and managing the locomotive and train of cars. The petition is clearly within the rule of the case before cited.' In *Pope v. Railroad*, 99 Mo. 400, 12 S. W. 891, the negligence charged was general. The sufficiency of the petition was challenged. Brace, J., said: 'The objection urged against it, however, that it does not specify the particular act of negligence which it is claimed caused the injury, is answered by the case of *Sullivan v. Railroad*, 97 Mo. 113, 10 S. W. 852; *Johnson v. Railroad*, 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351.' These cases have been cited approvingly and followed in *Dickson v. Railroad*, 104 Mo., loc. cit. 502, 16 S. W. 381; *Shaw v. Railroad*, 104 Mo., loc. cit. 656, 16 S. W. 832; *Le May v. Railroad*, 105 Mo., loc. cit. 370, 16 S. W. 1049. In all these cases the negligence was charged in general terms, and followed substantially the language of the statute. Rev. St. 1889, § 4425. The negligence charged in the case at bar is as specific as that charged in the *Sullivan Case*, supra, or in any of the cases that have followed it, and is a substantial compliance with the requirements laid down in the *Gurley Case*." To the same effect is *Malloy v. Railway Co.*, 173 Mo. 75, 73 S. W. 159. That was also a case in which the injuries complained of resulted from a collision between the car upon which the plaintiff was riding as a passenger and another car upon the track of the defendant. In that case the collision alleged, and the negligence charged in the petition, was that the defendant "did, by the servants in charge of said car and its servants in charge of another of the cars, so carelessly manage and control said cars as to cause and suffer the same to

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collide." The complaint was urged in that case that the petition was not sufficiently broad, and this court very clearly and tersely responded to such complaint in the following language: "Certain it is that the collision was caused by the negligence of some one or more of the defendant's servants who were in charge of the cars, in one capacity or another, and directly connected with their movements. It follows that the petition is as broad as is necessary to support a recovery in this case, and that, as it was not incumbent upon the plaintiff to charge the specific negligence of any particular servant, so it was not necessary for the plaintiff to show which servant so in charge of the cars was negligent, for the defendant was liable for the negligence of all such servants."

2. It is earnestly urged that the court erred in refusing to give defendant's instruction in the nature of a demurrer to plaintiff's evidence, and in refusing to instruct the jury to find the issues for the defendant at the close of all the evidence. The basis of that contention is predicated upon the theory that there was a failure of proof upon the case stated in the petition. In other words, that the testimony elicited upon the trial of this cause failed to show that plaintiff's deceased husband was at the time of his death a passenger upon defendant's train of cars. It is earnestly contended and ably argued that by reason of the testimony of the conductor that plaintiff's husband had only paid his fare from Marshall to Nelson, that when the train reached Nelson and stopped a reasonable length of time for the passengers on the train to alight, that the relation of passenger and carrier as between plaintiff's husband and defendant ceased. We are unable to agree with counsel for appellant upon this insistence. Conceding, for the purposes of the discussion upon this proposition, that the court and jury were bound to accept the conductor's statement that plaintiff's husband had only paid his fare to the station of Nelson, yet were not the facts and circumstances detailed in evidence sufficient to warrant the court in submitting the question as to whether or not after reaching Nelson, or before reaching there, that he concluded or determined to remain on the train and continue his journey to Blackwater, and that his remaining on the train was for that purpose. The testimony clearly shows that the home of the deceased was at Blackwater; his family was there, and he had only left that place for Marshall a few hours previously, and was at the time of the collision returning from the last-mentioned place on a train going towards his home. The coach in which the deceased was traveling stopped at Nelson 25 or 30 minutes before the collision. The testimony fails to show that he made any effort to alight from it, and, if he did alight from the car, he must have returned, for he was found fatally injured in the coach in which he was traveling, immediately after the collision.

It is conceded by appellant's counsel that, if plaintiff's husband had stepped off the car and then stepped on again at Nelson, he would then have been entitled to protection as a passenger,

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whether the conductor knew he was on the train or not. However, it is contended that, if he remained on the train for the purpose of continuing his journey to Blackwater, it devolved upon him to notify the conductor or for the conductor to have knowledge of his purpose to continue such journey before he was entitled to protection as a passenger. We are unable to give our assent to the views of counsel for appellant upon this proposition as to the law which should govern the relation of carrier and passenger. It was ruled in *Barth v. Railway Co.*, 142 Mo. 535, 44 S. W. 778, that when the train of a common carrier stopped at a station and passengers were permitted to alight, and the iron gate to the platform was opened, it was an invitation to the passengers to take passage thereon. If it be true that, when a common carrier stops its train of cars at the platform at one of its stations, such act upon its part is an invitation to passengers to take passage on the train, is it not equally true that those who are on the train and desire to extend their journey further than was originally contemplated, the invitation is extended to such person to remain on the train, and, if in fact they do remain on the train for such purpose, are they not in the eyes of the law entitled to the same protection as passengers as those who enter the train for the first time at such station? There is no rule of law which requires a passenger, if he has only paid his fare to a certain point of destination, which absolutely requires him to leave the train at that point; but, if he desires to continue his journey, it is manifestly his right to remain in the car and when demanded of him, pay his fare to the place of destination. It is but common knowledge that persons traveling upon railroad trains very frequently do not alight and stop at the point of destination originally contemplated when they entered the car, but proceed to some other point where business may call them, and under such circumstances they simply remain on the train and proceed with their journey, and in our opinion they are no less passengers in contemplation of law than if they had alighted from the train at the station originally contemplated, transacted business, and re-entered the coach for the purpose of continuing their journey. The question in this case is not whether plaintiff's husband had been afforded reasonable time to leave the train at the station to which he had paid his fare, but whether or not, if he purposed to go further, was he in duty bound, in order to preserve his protection as a passenger, to alight from the train and then immediately re-enter it. We are of the opinion that this would be a useless and meaningless performance which the law does not impose upon any citizen in order to preserve his protection as a passenger, upon the train of a common carrier.

The defendant in this case was a common carrier, and plaintiff's deceased husband at the time of the collision was in the coach used by defendant for the purpose of transporting passengers. He resided at Blackwater, and his family was there, and

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at the time of this collision the train had started to carry such passengers as were on it to other points of destination along its line. Under this state of facts the presumption must be indulged that plaintiff's husband was lawfully in such coach. This principle was expressly ruled in *Pennsylvania Ry. Co. v. Brooks*, 98 Am. Dec., loc. cit. 234. It was there said that "every one riding in a railroad car is presumed prima facie to be there lawfully as a passenger, having paid, or being liable when called on to pay his fare, and the onus is upon the carrier to prove affirmatively that he was a trespasser." To the same effect is *Louisville Ry. Co. v. Thompson* (decided by the Supreme Court of Indiana) 9 N. E. 357, 57 Am. Rep. 120. It was there said that the authorities abundantly prove "that one who is on a train used for carrying passengers is, in the absence of countervailing evidence, presumed to be rightfully there as a passenger." A similar ruling was made in *Gillingham v. Railway Co.* (W. Va.) 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827. While it may be said that the jury in the trial of this cause were not bound to accept the testimony of the conductor that plaintiff's husband had only paid his fare to Nelson, yet, as before stated, conceding that they should accept such testimony as true, still, if deceased remained in the defendant's coach for the transportation of passengers, for the purpose of proceeding to some other point on the line of defendant's road, and with the intention of paying in money his usual fare for such transportation to such other point, he was as much a passenger in contemplation of law as though he had entered the train for the first time at the station of Nelson.

Upon the facts as developed in this case, the court would not have been warranted in declaring, as a matter of law, that there was no evidence tending to show that plaintiff's husband was not a passenger on defendant's train at the time he was killed. It was not essential, in order to authorize the submission of this cause to the jury, to show by positive or direct evidence that plaintiff's husband was a passenger at the time of the collision, or that it was his purpose to continue his journey further on from Nelson station; but, if the facts and circumstances detailed in evidence were such as indicated the purpose and intention of deceased to proceed further on his journey from Nelson station, then the court would not have been authorized in disregarding the legitimate inference the jury were warranted in drawing from the circumstances detailed in evidence. Take the facts in this case, about which there is no dispute, and we are unable to see how to escape the conclusion that they authorized the submission of the cause to the jury. In the first place, the train stopped at Nelson station 25 or 30 minutes. There is an absence from the record of any testimony showing that the deceased alighted from the train, nor was there anything in his conduct or actions indicating that he desired or intended to get off the train. He remained in the passenger coach designed for the purpose of transporting passengers, and the conductor testified

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that at the time of the collision the train upon which deceased was traveling had started to move. Still no effort on the part of the deceased to alight from this train. His home and family were at Blackwater, the place that he had left a few hours previously, to go to Marshall. The collision occurred while the train that he was upon was moving in the direction of his home. After the collision he was found in the coach where passengers should be. The actions and conduct of the deceased in this coach clearly manifested an intention and purpose on his part to remain in said coach as a passenger and pay his fare when demanded of him, and he did remain in it until it started to leave the station to which the conductor says that he had paid his fare. The coach on defendant's train was for the purpose of carrying passengers, and, if the deceased desired to proceed to his home at Blackwater, he had the right to remain in said coach for that purpose, and he was not in any sense a trespasser in contemplation of law. The instruction in the nature of a demurrer to the evidence was properly denied by the court.

3. Complaint is urged that the court erred in refusing defendant's instruction No. 2. Counsel in their brief refer to this instruction as No. 3, but the record discloses that the legal propositions are all embraced in instruction No. 2. We have given such instruction so refused our careful consideration, and have reached the conclusion that there was no error in the court denying appellant's request. This instruction is reproduced in full in the statement of this cause, and the second subdivision of such instruction substantially announces as a legal proposition that if the deceased had taken passage on the train at Marshall, Mo., and had paid his fare to the station of Nelson, that it was essential after the arrival of said train at Nelson for the deceased to notify the conductor that he wished to go further on said train. Then follows the further statement that if he remained on board the train talking to a friend, without notifying the conductor of said train that he wished to go further on said train, and that the conductor on said train did not know that he remained aboard said train after the arrival at Nelson, then and in that case he was not a passenger. In the first place there was no testimony that the deceased was talking to a friend on the train, and in the second place, as heretofore indicated, if the deceased was in the passenger coach and purposed to proceed further upon his journey he had the right to remain in such coach, and it was not essential that he should expressly notify the conductor that he wished to go further on said train. It will not be seriously denied that, if persons at the station of Nelson had entered said coach, they were passengers from the time of their entrance into the same, whether the conductor had any knowledge of their entrance or not, or whether they had a ticket or had paid their fare to the conductor. It was only necessary that they enter the coach either with a ticket authorizing their transportation, or with the intention of paying the usual fare for the same, and we are unable to see any well-grounded legal distinction between the person who

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entered the coach from a station for the purpose of going to some other point on the line of road, and the person who happens to be in the coach and remains there with the purpose of proceeding further, and with the intention of paying his fare to the point he desired to go.

4. It is further insisted that the court erred in its refusal of the first subdivision of instruction No. 2. That portion of the instruction required the jury to find that the deceased was a passenger in said train as was defined by the terms embraced in the second subdivision of instruction No. 2. We have indicated that the second subdivision of instruction No. 2 was erroneous and did not properly declare the law. Hence it follows that the first subdivision of instruction No. 2, which had for its basis the erroneous instruction, was also properly denied by the court. Again, it is insisted that the refusal of instruction No. 2 left this case submitted to the jury without any requirement that they should find the deceased was a passenger, and without any guide as to what facts constituted him a passenger. The appellant has manifestly overlooked what in fact the jury were required to find in order to entitle plaintiff to recover. It will be observed that the defendant, in its instruction requested upon the measure of damages, practically conceded and assumed by the terms of that instruction that deceased was a passenger on its train of cars; but, aside from this, the instructions given by the court required the jury to find every essential fact necessary to entitle plaintiff to recover. Instruction No. 1, as given to the jury by the court, required the jury to find that plaintiff's deceased husband was a passenger on one of defendant's trains. That the deceased was a passenger up to the time the train reached the station of Nelson is conceded by appellant and is testified to by the conductor. Hence the crucial question of fact to be found by the jury was whether or not he remained a passenger and was a passenger at the time the train was starting from Nelson station in the direction of Blackwater, and the jury in the closing part of instruction No. 1, given on the part of the plaintiff, were required to find every essential fact necessary to constitute him a passenger. They were told that, "if the jury believe from all the facts and circumstances in evidence that he determined to continue his journey to Blackwater and remained on said train for that purpose, the fact that he only paid his fare at Marshall to Nelson is no defense to this suit." While it may be said that the instruction is unhappily worded, and should have stated that the finding of the facts embraced in it would constitute deceased a passenger, yet the instruction required the finding of every essential fact necessary to make him a passenger, and the true meaning and import of it was that, if they found that state of facts, they would find that he was a passenger, and the fact that he only paid his fare to Nelson would constitute no defense to this suit. In other words, no other meaning can be given that instruction, it being conceded

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that he was a passenger up to the time the train reached Nelson, other than that, if the jury should believe from all the facts and circumstances in evidence that he determined to continue his journey to Blackwater, and remained on the train for that purpose, he was a passenger. This was clearly the effect of that instruction. Hence it must be ruled that under that instruction the jury were required to find that the deceased was a passenger, as well as all the essential facts necessary to constitute him such passenger, and, this question having been fairly submitted to the jury, there was no error in the refusal of the instruction requested by the appellant.

5. This brings us to the consideration of the only remaining proposition involved in this cause, that is, the contention of the appellant that the court erroneously refused defendant's instruction No. 1 as to the measure of damages. This suit was brought under section 2864, *supra*, and under the evidence introduced upon the trial the court very properly confined the recovery to that section. Instruction No. 1 upon the measure of damages, requested by the appellant, the refusal of which is now complained of, was entirely foreign to the section of the statute upon which this suit is predicated. Defendant's contention is that the death of plaintiff's husband was occasioned by the negligence of the brakeman, and that he was not a servant such as contemplated by the statute, engaged in the operating and managing of trains, therefore plaintiff was not entitled to recover in this action the definite fixed sum of \$5,000 as a forfeiture under section 2864. In support of this contention, our attention is directed to the case of *Culbertson v. Railway Co.*, 140 Mo. 35, 36 S. W. 834. A careful analysis of that case will demonstrate that it has no application to the case at bar. The petition in this case proceeds upon only one theory, and that is, it is alleged that plaintiff's deceased husband was a passenger upon defendant's train, and that his death was occasioned by the negligence and unskillfulness of the agents, servants, and employees of the defendant whilst so running, conducting, and managing said train of cars and locomotives. In the *Culbertson Case*, relied upon by appellant, there were different acts of negligence alleged and relied upon for recovery. Some of the acts complained of in that case would fall within the provisions of the section fixing a definite penalty, and others brought the case under a provision of the statute in which no definite penalty clause was fixed, and upon that question *Gantt, J.*, speaking for this court, simply announced the rule. He said: "It has been uniformly ruled in this state that, where different acts of negligence are alleged and relied upon, and some of them bring the case within the penalty clause of section 4425, and others bring the case within section 4426, it is error to instruct solely for the penalty. *Crumpley v. Railroad*, 98 Mo. 34, 11 S. W. 244; *King v. Railroad*, 98 Mo. 235, 11 S. W. 563; *Rapp v. Railroad*, 106 Mo. 423, 17 S. W. 487." That is not this case. That the brakeman is a servant who has duties to perform in operating and

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managing a train, such as the use of brakes, giving signals, etc., and whose negligent performance of such duties may easily produce fatal results, is too plain for discussion. Hence it must be held that he was a servant engaged with others in operating and managing the train upon defendant's railroad. *Malloy v. Railway Co.*, 173 Mo., loc. cit. 81, 73 S. W. 159; *Rinard v. Railway Co.*, 164 Mo. 270, 64 S. W. 124.

We have thus indicated our views upon the propositions disclosed by the record in this cause. There is no dispute that the collision which resulted in the death of plaintiff's husband was occasioned by the negligence of defendant's employees. The testimony plainly shows that fact, and it is practically conceded, and we see no escape from the conclusion, that the court properly submitted this cause to the jury, and that the evidence is sufficient to support the finding of the jury; that the plaintiff's husband determined to become a passenger from Nelson to Blackwater, and was on the train for that purpose when killed. His home was at Blackwater, his family was there, and he had left his home that afternoon for Marshall. The local freight train, which provided a coach for passenger service, stopped at Nelson Station 25 or 30 minutes; the conductor had given the signal to start; and the train had in fact started towards Blackwater before the collision occurred, and the plaintiff's husband was on the moving train in the regular passenger coach, and we are of the opinion that it was manifestly a correct and legitimate inference to be drawn by the jury that plaintiff's husband was on the train for the purpose of going to Blackwater, which was his home and natural destination.

Entertaining the views as herein indicated, it results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered. All concur.

STATE ex rel. ELLIS, Atty. Gen., v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida, May 29, 1906.)

[41 So. Rep. 529.]

Carriers—Duties—Service of Public—Discrimination.*—A railroad company, acting as a common carrier, is bound to serve all the members of the public alike who apply for service under like conditions.

*For the authorities in this series on the subject of the duty of common carriers to receive and transport freight without discrimination, see foot-notes appended to *Southern Express Co. v. R. M. Rose Co.* (Ga.), 18 R. R. R. 565, 41 Am. & Eng. R. Cas., N. S., 565; foot-note appended to *Agee & Co. v. Louisville & N. R. Co.* (Ala.), 18 R. R. R. 129, 41 Am. & Eng. R. Cas., N. S., 129; foot-notes appended to *Central of Georgia Ry. Co. v. Augusta Brok. Co.* (Ga.), 16 R. R. R. 634, 39 Am. & Eng. R. Cas., N. S., 634; foot-notes appended to *State v. Chicago, etc., R. Co.* (Neb.), 14 R. R. R. 402, 37 Am. & Eng. R. Cas., N. S., 402.

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Same—Freight.†—Where a railroad company, acting as a common carrier, voluntarily engages in transporting and delivering between stations on its line of road the poles, wires, etc., of one telegraph company, it may be compelled by mandamus to perform a similar service for another telegraph company; nor is the duty of the common carrier affected by reason of the service being performed under a contract.

(Syllabus by the Court.)

In Banc. Application by the state, on the relation of W. H. Ellis, Attorney General, for a writ of mandamus against the Atlantic Coast Line Railroad Company. Demurrer overruled.

This is an original proceeding in mandamus, brought by the Attorney General under the provisions of chapter 4700, p. 76, Acts 1899, to enforce an order of the Railroad Commissioners, and seeks practically the same relief which was sought in a previous proceeding by mandamus in this court (40 South. 875) between the same parties, but under different conditions.

The alternative writ is as follows:

“Whereas, by a petition caused to be filed in this court by the Railroad Commissioners of the state of Florida, in the name of the said state, upon the relation of W. H. Ellis, Attorney General of said state, it has been made to appear: That complaint was heretofore made to the Railroad Commissioners of the state of Florida by the Postal Telegraph Cable Company, a body corporate under the laws of the state of New York and engaged in a general telegraphic business throughout the United States, with lines of wire in the several states, and in the state of Florida, against the Atlantic Coast Line Railroad Company, a railroad corporation engaged in the business of a common carrier and having and operating a railroad in the state of Florida, that the said Atlantic Coast Line Railroad Company was guilty of unjust discrimination in favor of the Western Union Telegraph Company by transporting and distributing for said Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire along its railroad, in said state, and refusing to perform like services for any and all other telegraph and telephone companies; that due notice was served by the Railroad Commissioners on the said Atlantic Coast Line Railroad Company that there would be a meeting of the said Railroad Commissioners at their office in Tallahassee, at 10 o'clock a. m., April 9, A. D. 1906, at which they would be heard to show cause, if any they had, why such unjust discrimination should not cease, and they be required to transport and distribute for any and all telegraph and telephone companies their men, wire, poles, and other material over and along the line of their railroad within the state of Florida, and

†For the authorities in this series on the question whether mandamus or injunction is the proper remedy where it is sought to compel a common carrier to receive and carry freight, see foot-notes appended to *Southern Express Co. v. R. M. Rose Co.* (Ga.), 18 R. R. R. 565, 41 Am. & Eng. R. Cas., N. S., 565.

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why a just and reasonable rate should not be prescribed for said Atlantic Coast Line Railroad Company to charge for such services; that the said railroad company did not appear by counsel or otherwise, in response to said notice, and failed to file any answer to said complaint; that the said Railroad Commissioners did thereupon find and determine that the said Atlantic Coast Line Railroad Company, in hauling and distributing between stations on and along its line of railroad in the state of Florida for the Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire, and in refusing to perform like services for any and all other telegraph and telephone companies, was guilty of an unjust discrimination in favor of the said Western Union Telegraph Company, and was in violation of chapter 4700 of the Laws of Florida; that it was thereupon ordered and adjudged by the Railroad Commissioners of the state of Florida that such unjust discrimination be discontinued, and that said Atlantic Coast Line Railroad Company be required to haul and distribute between its stations, on and along its line of railroad, in the state of Florida, for any and all telegraph and telephone companies, their men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of their lines of wire, and that the said Atlantic Coast Line Railroad Company, for such services performed and rendered any telegraph or telephone company, may charge the current tariff rates from the point of shipment to the first regular station next beyond the last intermediate place where such material is to be unloaded, and the consignor shall furnish all labor necessary to effect such distribution, and shall pay full first-class passenger fares for all men whom they send with such cars to effect such distribution, and for the extra service of stopping cars and engines between stations the railroad company may charge and collect ten dollars per car per day in addition to the current rate, a copy of said order being attached to said petition, and a like copy being hereto annexed, marked 'Exhibit A.' That the Postal Telegraph Cable Company, a body corporate under the laws of the state of New York and engaged in a general telegraphic business throughout the United States, with lines of wire in the several states, and in the state of Florida, desiring to extend its telegraphic line from the city of Jacksonville, in the county of Duval, to the city of Lakeland, in the county of Polk, in the state of Florida, and for that purpose to construct, maintain and operate a line of poles and wires along the right of way of the said Atlantic Coast Line Railroad Company from the said city of Jacksonville to the said city of Lakeland, and into and through the counties of Duval, Clay, Putnam, Volusia, Orange, Osceola, and Polk, by regular proceedings in the circuit court for Duval county, Florida, under the statutes of said state in such cases made and provided, condemned and acquired a right of way and easement to so construct, operate, and

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maintain a line of poles and wires upon the right of way of the said Atlantic Coast Line Railroad Company through the counties aforesaid. That after the order of the Railroad Commissioners was made as aforesaid the said Postal Telegraph Cable Company applied to the said Atlantic Coast Line Railroad Company to haul and distribute between its stations on and along its line of railroad, between the city of Jacksonville and the city of Lakeland, and through the counties of Duval, Clay, Putnam, Volusia, Orange, Osceola, and Polk, their men, poles, wire, and other material for the erection, construction, maintenance, and operation of their telegraph line between said cities of Jacksonville and Lakeland, and offered to pay for such services the current tariff rates of said railroad company from the point of shipment to the first regular station on its line next beyond the last intermediate place where such material is to be unloaded, and to furnish all labor necessary to effect such distribution, and to pay full first-class passenger fares for all men sent with such cars to effect such distribution, and, in addition, ten dollars per car per day for the extra service of stopping cars and engines between stations; but the said Atlantic Coast Line Railroad Company refused to receive and haul and distribute between their stations, on and along their line of railroad, from Jacksonville to Lakeland, the men, poles, wire, and other material of the Postal Telegraph Cable Company under the said order of the Railroad Commissioners, aforesaid, and still refuses so to do, although demand has been made for such service, as aforesaid. That the said refusal of the said Atlantic Coast Line Railroad Company to comply with and carry out the said order of the Railroad Commissioners of the state of Florida was brought to the attention of the said Railroad Commissioners, and thereupon an order was passed by the Railroad Commissioners requesting and directing the Attorney General of the state of Florida to institute such proceedings in the courts as may be necessary to enforce compliance by the Atlantic Coast Line Railroad Company with the order of the Railroad Commissioners aforesaid, in behalf of the said Postal Telegraph Cable Company.

And whereas, the state of Florida, by W. H. Ellis, the Attorney General of said state, prays that a writ of mandamus may issue from this court, directed to the said Atlantic Coast Line Railroad Company, a corporation, commanding it to obey the said order of the Railroad Commissioners of the state of Florida, in behalf of the said Postal Telegraph Cable Company, by receiving and hauling and distributing between its stations, on and along its line of railroad, in the state of Florida, between the cities of Jacksonville and Lakeland, and in and through the counties of Duval, Clay, Putnam, Volusia, Orange, Osceola, and Polk, the men, and poles, wire, and other material, of the said Postal Telegraph Cable Company, for the erection, maintenance, operation, repair, construction, and reconstruction of its telegraph line between the said cities of Jacksonville and Lakeland, at and for not exceeding the current tariff rates, from the point

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of shipment to the first regular station next beyond the last intermediate place where such material is to be unloaded, and full first-class passenger fares for all men sent by said Postal Telegraph Cable Company with the cars to effect such distribution, and ten dollars per car per day in addition to the said current tariff rates:

"Now, therefore, we, being willing that full and speedy justice should be done in the premises, do command you, the said Atlantic Coast Line Railroad Company, that you forthwith comply with the said order of the Railroad Commissioners of the state of Florida, in behalf of the said Postal Telegraph Cable Company, by receiving and hauling and distributing between the stations on and along the line of your railroad, in the state of Florida, between the cities of Jacksonville and Lakeland, and in and through the counties of Duval, Clay, Putnam, Volusia, Orange, Osceola, and Polk, the men, and the poles, wire, and other material of the said Postal Telegraph Cable Company, for the erection, maintenance, operation, repair, construction, and reconstruction of its telegraph line between the said cities of Jacksonville and Lakeland, at and for not exceeding the current tariff rates from the point of shipment to the first regular station next beyond the last intermediate place where such material is to be unloaded, and full first-class passenger fares for all men sent by said Postal Telegraph Cable Company with the cars to effect such distribution, and ten dollars per car per day in addition to the said current tariff rates, or that you show cause why you have not done so before our Supreme Court at the Capitol, in the city of Tallahassee, at 10 o'clock a. m., on the 8th day of May, A. D. 1906, and have you then and there this writ."

" 'Exhibit A.' "

" 'Order No. 94.

Railroad Commission, State of Florida.

" 'To the Atlantic Coast Line Railroad Company.

" 'Complaint having been made to the Railroad Commissioners of the state of Florida that the Atlantic Coast Line Railroad Company is guilty of unjust discrimination in favor of the Western Union Telegraph Company by transporting and distributing for said Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire along said railroad in said state, and refuses to perform like services for any and all other telegraph and telephone companies, and due notice having been served on the Atlantic Coast Line Railroad Company that there would be a meeting of the Railroad Commissioners at their office in Tallahassee, at 10 o'clock a. m., April 9, A. D. 1906, at which they would be heard to show cause, if any they had, why such unjust discrimination should not cease, and they be required to transport and distribute for any and all telegraph and telephone companies their

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men, wire, poles, and other material over and along the line of their railroad within said state of Florida, and why a just and reasonable rate should not be prescribed for said Atlantic Coast Line Railroad Company to charge for such services, and the said railroad company not having appeared, by counsel or otherwise, in response to said notice, and having filed no answer to the said complaint, and the commissioners being fully advised, do find that the said Atlantic Coast Line Railroad Company, in hauling and distributing between stations on and along its line of railroad in the state of Florida for the Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire, and in refusing to perform like services for any and all other telegraph and telephone companies, is guilty of unjust discrimination in favor of said Western Union Telegraph Company, and is in violation of chapter 4700 of the laws of Florida.

“ ‘It is hereby ordered and adjudged by the Railroad Commissioners of the state of Florida that such unjust discrimination be discontinued, and that said Atlantic Coast Line Railroad Company be and is hereby required to haul and distribute between its stations on and along its line of railroad, in the state of Florida, for any and all telegraph and telephone companies, their men, poles, wire, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of their lines of wire.

“ ‘It is further ordered and adjudged by the Railroad Commissioners of the state of Florida that the said Atlantic Coast Line Railroad Company, for such services performed and rendered for any telegraph or telephone company, may charge the current tariff rates from the point of shipment to the first regular station next beyond the last intermediate place where such material is to be unloaded, and the consignor shall furnish all labor necessary to effect such distribution, and shall pay full first-class passenger fares for all men whom they send with such cars to effect such distribution, and for the extra service of stopping cars and engines between stations, as above indicated, the railroad company may charge and collect ten dollars per car per day in addition to the current rate.

“ ‘Done and ordered by the Railroad Commissioners of the state of Florida in session at their office in the city of Tallahassee, Florida, this the 10th day of April, A. D. 1906.

“ ‘[Signed]

Jeffn. Browne, Chairman.

“ ‘Attest:

“ ‘[Signed]

R. C. Dunn, Secretary.’ ”

To this writ a demurrer has been interposed by the respondent and upon the issues thus raised has been argued and submitted. The following is the demurrer:

“Now comes the defendant, the Atlantic Coast Line Railroad Company, a corporation, and says that the alternative writ is bad in substance and insufficient in law to be answered.

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"The substantial matters of law to be argued are as follows:

"(1) That the order made by the Railroad Commissioners of the state of Florida is without authority of law.

"(2) That there is no authority of law for the Railroad Commissioners of the state of Florida to make a rate special and applicable to one railroad corporation and not applicable and enforceable as against all railroad corporations in the state; that they have only powers to make rates that shall be applicable and enforceable as to all railroad corporations.

"(3) That under and by virtue of said order of the Railroad Commission set forth in said alternative writ, it is sought to compel this respondent, a railroad corporation, and no other railroad corporation in the state of Florida, to transport and carry the articles therein named for a given price, and is therefore a discrimination against this respondent.

"(4) That the Railroad Commissioners of the state of Florida have no power to make an order directing or compelling a carrier to distribute freight at points other than the stations on its line of road, and there is no authority under the railroad commission act of the state of Florida for the Railroad Commissioners to make an order to compel a railroad company to deliver freight alongside of its road and at points between stations.

"(5) There is no power under the railroad commission act vested in the commissioners authorizing them to compel respondent to give to the Postal Telegraph Cable Company, either by contract or by way of rate made by the commissioners, the advantages or facilities it gives to the Western Union Telegraph Company by contract.

"(6) That it appears by said alternative writ that no railroad company other than this respondent was ever summoned to appear at any hearing before the Railroad Commissioners of the state of Florida, and that no railroad company other than the respondent was ever given an opportunity of being heard before the Railroad Commission as to the rate proposed to be made on the articles set forth in the alternative writ; and that by said alternative writ it appears that respondent solely and alone of all of the railroad corporations in the state was singled out for the purpose of having a rate made over its line of road and no other, for the articles named in said alternative writ.

"(7) That the powers of the Railroad Commission extend only to making reasonable and uniform rates to govern all of the railroad corporations in the state, as to the same product or article to be moved, and it cannot, under its powers, make a rate to apply to one corporation only and not to other corporations, though that rate may apply to that corporation as to all telegraph and telephone companies, since it does not apply to any other railroad company moving a like product."

Fred. T. Myers and Danl. W. Rountree, for relator.

John E. Hartridge, for respondent.

HOCKER, J. (after stating the facts). We do not think it

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necessary to repeat what is contained in the opinion in the previous case decided at this term between the same parties as to the powers of the Railroad Commissioners to correct abuses and prevent unjust discriminations by persons and corporations engaged as common carriers in transporting persons and property or performing other services of a public nature. The demurrer admits the allegations of the alternative writ, and those allegations in our opinion clearly show that the respondent has violated the general order of the Railroad Commissioners requiring it to perform for any and all telegraph and telephone companies a service, in effect, similar to that which it has performed as a common carrier for the Western Union Telegraph Company, by refusing the same service to the Postal Telegraph Cable Company. For we think it is clear that a railroad company where it acts as a common carrier is bound to serve all the members of the public alike, who apply for service, under like conditions.

The contention that the general order of the Railroad Commissioners is unauthorized by law inasmuch as it applies only to the respondent, we think is unfounded. In the very nature of things such an order could not be made to apply to another railroad company which had not voluntarily performed for some patron, the services described in these proceedings, which is in some respects peculiar, in that it involves the delivery of poles, wires, etc., between stations. But the respondent having voluntarily performed this service for the Western Union Telegraph Company may not deny it to another company applying for similar service under like conditions. The order of the Railroad Commissioners is a general order, and we think fully authorized by the Constitution and chapter 4700, p. 76, Acts of 1899. Nor is this duty affected by the fact that the service was performed for the Western Union Telegraph Company under an agreement or contract. The rates prescribed in this general order for the services to be rendered are general in their nature, and apply to all telegraph and telephone companies which seek to have the services performed and are not challenged on the ground of unreasonableness. The order, therefore, is in conformity with the views of this court as expressed in the opinion heretofore rendered at this term between the same parties. We refer to the authorities therein cited.

The demurrer is overruled, and the respondent is required to answer the alternative writ within 14 days from the filing of this opinion.

SHACKLEFORD, C. J., and COCKRELL, WHITFIELD, TAYLOR, and PARKHILL, JJ., concur.

NORTHROP *et al.* v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia, June 14, 1906.)

[53 S. E. Rep. 962.]

Street Railroads—Regulations—Ordinances—Construction.—A municipal ordinance requiring a street railway company to sell "tickets * * * to pupils presenting a certificate of enrollment in some school at the rate of two for five cents," to be used between specified hours from Monday to Friday, inclusive, adopted after the city had rejected the provision in the franchise proposed by the company requiring the sale for the accommodation of children going to and from school tickets at half rates to be used between specified hours, when construed in connection with the practice, adopted by the company and continued for several years, of selling tickets at the rate of two for five cents to the students of a business college, must be construed as requiring the company to sell tickets at such rates to the students of such college.

Error to Hustings Court of City of Richmond.

William Northrop and another, as receivers of the Richmond Passenger & Power Company, were convicted of a violation of a municipal ordinance of the city of Richmond, and they bring error. Affirmed.

Munford, Hunton, Williams & Anderson, for plaintiffs in error.

H. R. Pollard, for defendant in error.

KEITH, P. A warrant was issued by the police justice of the city of Richmond, charging William Northrop and Henry T. Wickham, as receivers of the Richmond Passenger & Power Company, with the violation of an ordinance of the city requiring the Passenger & Power Company to place on sale at convenient points within the city of Richmond tickets to be sold and delivered to pupils presenting certificates of enrollment in the Smithdeal Business College, a school located in the city of Richmond, at the rate of two for five cents, to be used between the hours of 8 a. m. and 4 p. m., from Monday to Friday, inclusive, which ordinance was approved December 23, 1899.

The receivers appeared, and a fine of \$25 and costs was imposed upon them. From this judgment they took an appeal to the hustings court of the city of Richmond, where the judgment of the police justice was affirmed; and to that judgment a writ of error was awarded by this court.

The ordinance of the city of Richmond which controls this case is as follows: "And the said company shall place on sale at convenient points within the city of Richmond, tickets to be sold and delivered to pupils presenting a certificate of enrollment in some school, at the rate of two for five cents, to be used only between the hours of 8 a. m. and 4 p. m., from Monday to Friday, inclusive."

The plaintiffs in error are charged with a violation of this

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ordinance, because they refused to sell the tickets, for which it provides, to a pupil duly enrolled in Smithdeal Business College, which is located in the city of Richmond, the contention of the Passenger & Power Company being that the descriptive terms used in the ordinance, "pupils * * * in some school," do not embrace students attendant upon a college, but that, in their usual and ordinary acceptation, the words, "pupils in some school," refer to institutions of a subordinate character which teach elementary learning, in distinction from places for more advanced instruction, which take distinctive names, such as academy, college, high school, seminary, university. Wharton's Law. Dict. Or, accepting Webster's definition, a school is a place of primary instruction, an establishment for the instruction of children; as, a primary school, a common school, a grammar school.

This position, taken in connection with the provisions of the ordinance which limit the hours and days upon which the tickets are to be sold at the reduced rate, would be entitled to great weight but for two considerations.

In the franchise granted by the city on the 28th of August, 1895, to the Richmond Traction Company, the sale of school tickets was provided for as follows: "And said company shall place on sale for the accommodation of children going to and from school, tickets at half rates, to be used only between the hours of 8 a. m. and 4 p. m. from Monday to Friday, inclusive." This language was offered by the Richmond Passenger & Power Company to the council of the city for adoption in the ordinance under which its franchises are held; but the council refused to incorporate that language in the franchise granted to the Passenger & Power Company, and embodied in the ordinance the provision as it now stands and under which the prosecution took place.

The ordinance, as it exists, is much broader in its terms and more favorable to the city than that which was proposed by the Passenger & Power Company for adoption; indeed, if the ordinance had been adopted in the terms in which it was offered by the Passenger & Power Company, it would have been plain and unambiguous, and would have excluded the class of persons who are now insisting upon its benefits as it was adopted; for the phrase "children going to and from school" would, without doubt, have referred to young people in attendance upon institutions of a subordinate character, and, in common acceptation, would have embraced only places of primary instruction and establishments for the instruction of children. But "pupils" is a word of much broader signification, and the council doubtless preferred it, and insisted upon its substitution in the place of the word "children" with the intention that it should embrace classes of young persons receiving instruction at more advanced institutions of learning, who would not be aptly described as "children going to and from school."

The other consideration to which we refer is that pupils of

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this institution had been granted the privilege of using half-rate tickets until the fall of 1903, when the company made a rule by which they were denied the privilege theretofore enjoyed, and by which they were not permitted to purchase or use the half-rate tickets.

It cannot be said that the view, insisted upon by the plaintiffs in error, is so plain and unambiguous as to render a resort to rules of construction unnecessary. The ordinance adopted, taken in connection with that which was proposed by the Passenger & Power Company, and rejected by the city when the franchise was granted, leaves in very great doubt, to say the least, whether the broad construction insisted upon by the city, or the narrow construction placed upon the language by the other party to the contract, should be adopted. It is the duty of courts to get at the true intent of the parties to the contract, and it is a recognized and accepted canon that, where the construction is doubtful, it is proper to look to the construction which the parties themselves have placed upon the contract. What more natural, indeed, than that the courts, in order to ascertain the intention of the parties, should seek for light in the construction which the parties themselves have placed upon the language which they have seen fit to employ. This ordinance was granted by the city to the Passenger & Power Company in December, 1899, and the use of half-rate tickets was enjoyed by the pupils of the Smithdeal Business College until the fall of 1903. See *Va. Pass. & Power Co. v. Com'th*, 103 Va. 644, 49 S. E. 995; *Vincennes v. Citizens Gas Light Co.* (Ind. Sup.) 31 N. E. 573, 16 L. R. A. 485; Page on Contracts, § 1126; *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652; *City of Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. Ed. 594.

As to rules governing the construction of penal statutes, see *Johnson v. So. Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, and *U. S. v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080, where it is said that, "though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature."

Speaking of penal statutes, Mr. Justice Story, in *U. S. v. Winn*, 3 Sumner, 209, Fed. Cas. No. 16,740, says: "Where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intention of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the Legislature."

We are of opinion that the judgment should be affirmed.

WEHMAN *v.* SOUTHERN RY.

(Supreme Court of South Carolina, April 23, 1906.)

[54 S. E. Rep. 360.]

Carriers—Baggage—Delay in Delivery—Damages.*—In an action against a carrier to recover for delay of baggage, an allegation that a party took his trunk to the baggage room in the evening and on the next morning bought a ticket and asked that the baggage be checked, and was informed that it had been sent by mistake to another point, that it would be forwarded to the passenger's destination, but that it never was so delivered, does not show notice to the carrier that he would be subject to special damages in case of non-delivery.

Appeal from Common Pleas Circuit Court of Charleston County; Memminger, Judge.

Action by F. Wehman against the Southern Railway. From a decree refusing to strike out certain allegations of the complaint, defendant appeals. Reversed.

The following is the order of court on motion to strike out certain allegations of the complaint:

"The decision under this motion involves the very important question as to whether a passenger can recover, from a common carrier, special damages for delay of his baggage, without specific notice to the carrier that such special damage was incident to and would flow from such delay, given by the passenger, in detail to the carrier before, or at the time the contract of carriage was entered into. Applying the rule laid down in the two very recent cases of *Traywick v. Ry. Co.*, 71 S. C. 82, 50 S. E. 549, and *Wesner & Co. v. Atlantic Coast Line*, 71 S. C. 211, 50 S. E. 789 (which were cases, however, for delay and injury to shipments of freight, and not baggage), to this case, it would seem to be settled law that no such special damage is recoverable, 'unless the special circumstances are known to the person who has broken the contract.' *Traywick v. Ry. Co.*, supra. This is on the principle of contemplation of consequences, whereunder a carrier can only be held liable, without notice, for such damage as reasonably and ordinarily would flow from the breach of such a contract, and would, therefore, be in the contemplation of the

*For the authorities in this series on the subject of the right to recover special damages from a carrier of freight for delay for loss, or injuries, see foot-note appended to *Wesner & White Mfg. Co. v. Atlantic Coast Line R. R. (S. Car.)*, 19 R. R. R. 342, 42 Am. & Eng. R. Cas., N. S., 342; foot-notes appended to *Wall v. Atlantic Coast Line R. R. (S. Car.)*, 19 R. R. R. 332, 42 Am. & Eng. R. Cas., N. S., 332; foot-notes appended to *Chicago B. & Q. Ry. Co. v. Todd (Neb.)*, 19 R. R. R. 113, 42 Am. & Eng. R. Cas., N. S., 113; *Bourland v. Choctaw, etc., Ry. Co. (Tex.)*, 19 R. R. R. 61, 42 Am. & Eng. R. Cas., N. S., 61; foot-notes appended to *Weston v. Boston & M. R. R. (Mass.)*, 19 R. R. R. 718, 42 Am. & Eng. R. Cas., N. S., 718; foot-note appended to *Central of Georgia Ry. Co. v. Chicago Port. Co. (Ga.)*, 18 R. R. R. 85, 41 Am. & Eng. R. Cas., N. S., 85.

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parties when the contract was entered into. In the case under consideration, however, and under this motion to strike the allegations of special damage from the complaint, I do not think the rule stated can be made to apply without straining the point in favor of the carrier and violating the sense of right, because, while it is not right that a passenger or shipper should expect a carrier to pay him special damages of which it had no notice in advance of entering into the contract of carriage, nevertheless it is more wrong that the carrier should be exempt from such special damage when such facts occur at such time as would reasonably put it upon its inquiry, which inquiry it does not see fit to pursue.

“The justice of the claim is resolved into a question of notice or knowledge, and notice may be implied from circumstances, and may be implied as well as expressed. In the Am. & Eng. Ency. of Law, vol. 21, p. 584, we find the following luminous exposition of the law upon this point: ‘Notice Implied from Circumstances—General Rule. Where such facts or circumstances are known to a person in relation to a matter in which he is interested as are sufficient to make it his duty as an honest and prudent man to inquire concerning the rights of other persons in the same matter, and in the course of inquiry thus suggested would, if followed with due diligence, lead to a discovery of rights in conflict with his own, the general rule is that he will be held chargeable with notice of all that he might thus have discovered, and will not be heard to say that he did not actually know of the fact or claim in question. Means of knowledge with the duty of using them are deemed equivalent to knowledge itself, and passive good faith will not serve to excuse willful ignorance.’ ‘Whatever puts person upon inquiry is sufficient notice.’ Id. note 1. Express companies are allowed to limit their liability as to the value of packages which are subsequently proved to contain more than their apparent value; but they are first required to exercise reasonable diligence by inquiry in ascertaining such value to ask the value and fix it upon the shipper to disclose the same. Who is not familiar with the request for statement of value when making a shipment by express, and the ‘value asked and not given’ clause in their receipts, which have been upheld by the courts, and prevents the shipper from recovering more than a fixed limited value? While such a salutary rule does not seem to be required of carriers generally, to wit, to ascertain by inquiry, before undertaking the contract of carriage, whether there are any special elements of damage which the shipper or passenger will incur and claim, the contract being broken, such a rule is not in conflict with our decisions; but is distinctly recognized in the Traywick Case, supra, where, while as above stated, it was held that no special damage was recoverable without notice (‘unless known’) to the carrier, and the admission, by the presiding judge, of testimony as to special damage was held error, it was held error only because the Supreme Court did not agree with

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the presiding judge in thinking that the facts there shown were enough to constitute notice of the special circumstances, expressly recognize the rule that it is simply a question of whether, in any particular case, the facts are such as to fix notice (express or implied) upon the carrier, and not exclude the principle, which I am following here, that such notice may be express or implied; and that whatever facts the carrier upon inquiry (which if reasonably pursued would lead to a discovery of all the facts), makes it as much his duty to pursue that inquiry as the duty of the shipper or passenger to make the special disclosures in detail in the first instance—in other words, fixes notice upon the carrier under the rule of implied notice above stated. In still other words, while there is a duty resting upon the shipper to disclose the special circumstances there is a corresponding duty upon the carrier, if not to inquire in the first instance (as is required of express companies) at least to use reasonable diligence in pursuing and inquiring where put upon it by the shipper or passenger.

“Now, in the complaint under consideration, it is alleged that plaintiff particularly asked the baggage master, as agent of the defendant carrier, about checking his trunk, and whether it would reach Augusta at the same time he would arrive there, and was assured that it would get there the same day, and ‘upon this assurance plaintiff went to Augusta on said morning,’ making it apparent that plaintiff’s trip to Augusta was undertaken only upon the assurance given about the trunk. Here there was the attention of the defendant particularly and specifically directed to the fact that it was unusually important for plaintiff to have his trunk not delayed in arriving at Augusta. Here was defendant put upon its inquiry, the slightest pursuit of which no doubt might have elicited from plaintiff the detailed information as to his special reasons for having the trunk with him in Augusta, which are now alleged as items of damage, and of which the defendant might thus have had actual notice by the exercise of the slightest degree of diligence in pursuing an inquiry which it seems to me he was put upon his notice fairly to pursue, and ‘the general rule is that he will be held chargeable with notice of all that he might have discovered, and will not be heard to say that he did not actually know of the fact or claim in question’—means of knowledge with the duty of using them are deemed equivalent to knowledge itself, and passive good faith will not serve to excuse willful ignorance. Here was the baggage master, agent of defendant carrier, face to face with the passenger seeking to have his trunk checked to Augusta, and making a special point of the importance to him of having that trunk in Augusta with him, and upon assurance only that the trunk would arrive there on the same day, he takes the train and goes to Augusta. Was this enough, upon the face of the situation, to put defendant upon its inquiry? Passengers usually wish their baggage to accompany them upon a journey, and it is probable that the law requires a higher de-

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gree of diligence in the transportation of personal baggage of passengers, as to time of carriage, than in ordinary shipments of freight; but certain it is that when a passenger alleges that he made a special point of having his baggage delivered at his destination when he reached there, and made the trip only upon the assurance that it would be so transported, there may be found by the jury upon trial, if proved, to be enough to put the carrier upon inquiry of the special circumstances which are incident with carriage or noncarriage of such baggage. I do not think the whole duty of disclosing the special circumstances is necessary to place upon the passenger, if he acts in good faith, but it is for the jury to say whether, in such a case, under an allegation whereunder notice may be implied, if the carrier by the exercise of reasonable diligence might have ascertained the special circumstances incident to a breach of the contract: under proper instructions from the court as to the law of express and implied notice, and I think the allegations of the complaint in that respect are sufficient.

"Upon this ground, the motion to strike out the allegations of special damage from the complaint herein, notice of which motion was served on May 3, 1905, and hearing thereunder had May 8, 1905, is refused. Let the defendant have ten days from notice of the filing of this order in which to plead to the complaint."

From this decree, the defendant appeals.

B. L. Abney and Jos. W. Barnwell, for appellant.

R. C. Merritt and Duncan J. Baker, for respondent.

POPE, C. J. After service of the complaint herein, the defendant gave written notice of its motion before his honor, Judge Memminger, to strike from the complaint certain parts thereof as irrelevant matter. A hearing was had before said judge, who refused the motion and who filed the grounds of such refusal; thereafter an appeal was taken from said order refusing the motion upon five grounds.

To correctly grasp the situation raised by the appeal, it will be proper to reproduce the complaint and said grounds of appeal. The report of the case should set forth the decision of the circuit judge. The following is a copy of the complaint: "First. That the defendant is now and was at the times hereinafter mentioned a corporation duly organized and chartered under the laws of the state of Virginia, and is a common carrier of passengers for hire between the city of Charleston, state of South Carolina, and city of Augusta, state of Georgia. Second. That on the 20th day of February, 1905, plaintiff delivered his baggage, consisting of a trunk, to defendant at its depot in the city of Charleston, said state, for the purpose of carrying the same with him to Augusta, state of Georgia, on the defendant's train, which was advertised to leave the city of Charleston on the morning of the 21st of February, and that defendant received

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plaintiff's trunk into its baggage room at its depot. Third. That on the morning of the 21st of February, as aforesaid, plaintiff purchased a ticket from the defendant, which entitled him to be transported, together with his baggage, from the city of Charleston to the said city of Augusta, and presented his ticket to the baggage master, defendant's agent, stationed in the baggage room at said depot for the purpose of having his said trunk checked to Augusta, but the defendant, through its said agent, refused to check the same, stating to plaintiff that his trunk was sent to Asheville, N. C., by mistake, but he assured him that the defendant would forward the same to Augusta, which would reach Augusta on the same day that plaintiff reached there. Upon this assurance plaintiff went to Augusta on said morning train. Fourth. That defendant failed to send plaintiff's trunk to Augusta as it contracted to do, and also kept plaintiff out of possession of said trunk for several days after he had returned to the city of Charleston. Fifth. That by reason thereof plaintiff was put to the expense of remaining in Augusta several days, lost the amount he paid for his ticket, lost the amount he had expended in advertising his business, lost the rent he paid for an office in which he intended to conduct his business, and suffered loss of time while out of possession of said trunk, and has been damaged thereby in the sum of \$405.30. Wherefore, plaintiff demands judgment against the defendant for the sum of \$405.30, and the costs of this action."

The following are the five grounds of appeal: "First. Because it is respectfully submitted that his honor, the circuit judge, erred in not striking out the following words in the fifth paragraph of said complaint, to wit, the words 'lost the amount he paid for his ticket,' following the words 'several days,' inasmuch as the words proposed to be stricken out cover special damages, and there are no allegations in the complaint showing that the special circumstances which would authorize the recovery of special damages were known to the defendant company, and the said damages were too uncertain, speculative, and remote to be recovered under the allegations of the complaint. Second. Because it is respectfully submitted that his honor, the circuit judge, erred in not striking out the following words in the fifth paragraph of the complaint, to wit, the words 'lost the amount he had expended in advertising his business, lost the rent he paid for an office in which he intended to conduct his business,' following the word 'ticket' in said paragraph, inasmuch as the words proposed to be stricken out cover special damages, and there are no allegations in the complaint showing that the special circumstances which would authorize the recovery of special damages were known to the defendant company, and the said damages were too uncertain, speculative, and remote to be covered under the allegations of the complaint. Third. Because it is respectfully submitted that his honor, the circuit judge, erred in not striking out the following words in the fifth para-

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graph of the said complaint, to wit, the words 'and suffered loss of time while out of possession of said trunk,' following the word 'business' in the said paragraph, inasmuch as the words proposed to be stricken out cover special damages, and there are no allegations in the complaint showing that the special circumstances which would authorize the recovery of special damages were known to the defendant company, and the said damages were too uncertain, speculative, and remote to be recovered under the allegations of the complaint. Fourth. Because it is respectfully submitted that his honor, the circuit judge, erred in deciding that the allegations of the complaint were sufficient to put the defendant upon inquiry of the special circumstances which were incident to the carriage or noncarriage of his baggage mentioned in the complaint. Fifth. Because it is respectfully submitted that his honor, the circuit judge, erred in deciding that the allegations of the complaint were sufficient to imply such notice as to require the court to submit the question to a jury whether the carrier by the exercise of reasonable diligence might have ascertained the special circumstances incident to a breach of the contract; whereas, it is respectfully submitted that the defendant, under the allegations of the complaint, not only was given no notice of the special circumstances which would justify the recovery of the special damages, but no notice which would require the defendant company to make any inquiry, it being the duty of the passenger to inform the carrier of such circumstances, and not the duty of the carrier to make inquiry of the passenger."

We will now pass upon the grounds of appeal in the following order:

First. As to the first, second, and third grounds of appeal. When the complaint is examined it will be seen that all that the plaintiff did was to purchase a ticket in the office of the defendant railway in the city of Charleston, S. C., for a passage on said railway from the city of Charleston to the city of Augusta, Ga. That the plaintiff, on the 20th day of February, 1905, had placed his trunk in the baggage room of the defendant's station at Charleston, S. C., and that on the 21st of February, 1905, carrying his ticket so purchased to the baggage master of the defendant, he demanded that his trunk should be checked from Charleston, S. C., to Augusta, Ga. Whereupon said baggage master refused to check said trunk, giving as his reason for such refusal that said trunk had been carried by mistake from Charleston, S. C., to Asheville, N. C. But the said baggage master assured the plaintiff that the defendant would send his trunk to said city of Augusta, Ga., on that day, and that such trunk would reach him on his arrival on that day at Augusta, Ga. On the contrary, the trunk of plaintiff was never forwarded by the defendant to Augusta, Ga. That said trunk, after the delay of several days, was finally delivered to plaintiff in the city of Charleston, S. C. That the plaintiff remained in the city

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of Augusta, Ga., for several days without receiving his trunk. No doubt there occurred a serious inconvenience to the plaintiff being separated from his baggage. But that is not the question here. The matter of concern just now is, did the servant and agent of the defendant receive any notice of the special circumstances of damage to the plaintiff, by the delay of his baggage? It has been held in this state, in the cases of *Traywick v. Ry. Co.*, 71 S. C. 82, 50 S. E. 549, and *Wesner & White v. Atlantic Coast Line R. R.*, 71 S. C. 211, 50 S. E. 789, that special damages, which do not arise from special circumstances in the knowledge of the defendant, cannot be recovered. The circuit judge admitted this rule, but he was influenced in his conclusion by what was an implied notice of special circumstances by the language of the complaint. We think he was in error in this conclusion, for we do not think that the allegations of the complaint can be said to make a suggestion of facts which would put the defendant on notice of any special circumstances. We, therefore, sustain these three exceptions.

Second. We think this ground of appeal is well taken, for we do not think that the allegations of the complaint were sufficient to put defendant upon inquiry of the special circumstances which were incident to the carriage or noncarriage of his baggage, mentioned in the complaint. This exception is sustained.

Third. We cannot see how any questions could be presented to the jury in view of the allegations of the complaint touching the exercise of reasonable diligence by the defendant in search of an ascertainment of any special circumstances relating to a breach of the contract. This exception was sustained.

It is the judgment of this court that the judgment of the circuit court appealed from be reversed.

ILLINOIS CENT. R. CO. v. JOHNSON & FLEMING.

(Supreme Court of Tennessee, June 9, 1906.)

[94 S. W. Rep. 600.]

Damages—Contract—Breach—Special Damages—Notice.*—One seeking to recover special damages for breach of a contract must show that such damages were within the contemplation of both parties to the contract; otherwise he can only recover such damages as in the usual course of things flow from the breach.

Carriers—Delivery—Delay—Special Damages—Notice.*—Plaintiffs, having a time contract in Arkansas for the boring of a deep well, shipped certain pipe therefor over defendant's railroad, and at the time notified defendant's agent that the pipe was needed very badly, and that they were putting in another well some place in Arkansas. Held, that such information did not give the carrier notice that plaintiffs had a contract which would be forfeited in the event of a failure to deliver the pipe promptly, or that plaintiffs were boring the well for others than themselves, and was insufficient to charge the carrier with loss of profits occasioned by a cancellation of the contract for

*See preceding case, and foot-note.

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delay and loss sustained in the purchase of other appliances for the work.

Same—Notice after Shipment.*—Notice to a carrier, after goods have been shipped, of circumstances which render special damages a probable consequence of delay, does not affect the original contract so as to render the carrier liable for such damages, though the subsequent delay is unreasonable.

Same.*—Mere delivery of iron pipe and other appliances for the boring of a well to a carrier for transportation was insufficient of itself to give notice to the carrier of the existence of a time contract between the consignees and the owner of the well which would probably be affected by delay in the delivery of the material.

Same—Damages—Rental of Equipment.*—Where a carrier was guilty of negligent delay in the delivery of materials and appliances intended for use in the performance of a well-drilling contract, but the carrier never had in its possession a part of the equipment, it was only liable for the usable rental value of the material and appliances which it had in its keeping, and not for the rental value of the whole equipment during the delay.

Same—Delay in Shipment—Refusal to Accept.—A consignee by declining to receive a delayed shipment from the carrier cannot convert the carrier into a tort-feasor and hold him liable in trover for the value of the property.

Same—Purchase of New Material—Damages.*—Where a consignee of materials and appliances for the drilling of a well was compelled to purchase new materials because of the carrier's delay in delivering the materials shipped, and on tender of delivery the consignee refused to receive the delayed shipment, he could not recover the difference between the rejected materials and the amount paid for the new.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Action by Johnson & Fleming against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Cooper & Cooper and *Charles N. Burch*, for appellant.
Flippin & Neuhardt, for appellee.

BEARD, C. J. The defendant in error had a contract to bore a deep well at Blytheville, in the state of Arkansas, and having a part of the apparatus, used in doing such work in Grenada, Miss., on the 23d of September, 1903, at that point delivered to the Illinois Central Railroad Company, for shipment to Memphis, Tenn., this property which was consigned to their own order. On the 2d of October, 1903, they were notified by their agents of the railroad at Memphis, of the arrival of the car containing this shipment, and that upon the payment of the freight the same was subject to removal. Upon receiving this notice, the defendants in error paid the freight that was due and demanded a delivery of their property. A diligent search was at once instituted for it, but it was not found within the yards of the company. Repeated, but fruitless, efforts were made for several days in succession to locate the car containing this property. Believing the property lost beyond recovery, the defendants in

*See foot-note on preceding page.

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error went into the open market and supplied its place by the purchase of new material at a cost of about \$655. This new material was shipped to Blytheville, to be used in conjunction with so much of the outfit as was already there in carrying out the contract which the defendants had for the boring of the well, but the parties with whom they had contracted declined to permit them to go on with the work, upon the ground that the time had already passed when by the terms of the contract the well was to be completed. The outfit shipped from Grenada was located by the railroad company on or about the 1st of November, 1903, and a delivery thereof was then tendered to the defendants in error. The tender was declined, and thereupon the present suit was instituted to recover the damages which the shippers alleged they sustained from the unreasonable detention of this property.

In the amended declaration, with very much more of detail than was found in the counts of the original declaration, the complaint of the defendants in error is set forth. In this they allege that the portion of the outfit which was shipped by them from Grenada constituted an essential part of the whole which was necessary for the successful carrying out of the contract heretofore referred to, and that, as a result of the unreasonable delay in the delivery of the same, they were put to the necessity of replacing this property by the purchase and at the price already stated; that there was also entailed upon them a heavy expense in keeping a crew of men waiting to carry out their well-boring contract; that in the shipping of their material to Blytheville and reshipping it therefrom, after the cancellation of the contract, further loss was inflicted upon them. They allege also a loss of profit from this cancellation of \$1,000.

In the conclusion of this pleading is the following paragraph: "Plaintiffs further aver that they have a right of action against the defendants for the loss of said articles and delay in their shipment and prompt delivery; for the cost of supplying same; the freight paid thereon; the loss of the profit in said contract at Blytheville; the loss of shipping and reshipping to the town of Blytheville; and the cost of keeping said crew of men from the time said machinery and articles should have been delivered by the defendants to the time of the cancellation of said contract."

Upon proper pleas this case went to the jury, which returned a verdict as follows: "We, the jury, find damage for the plaintiff of \$880, for rental of equipment, and \$166 additional cost of pipe, etc., with interest at 6 per cent. from October 2, 1903, to June 19, 1905." Both parties were dissatisfied with this verdict, and made motions for a new trial, which were overruled by the trial judge, who thereupon entered up a judgment in accordance with its terms. Both parties have prosecuted the case to this court, and have assigned errors upon the action of the trial judge.

It is unnecessary to set out the several assignments of error,

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as it is conceded by the respective counsel that all, save one, are resolvable into the single question, What is the proper measure of damages in this case?—it being conceded by the plaintiff in error that for its failure to deliver in a reasonable time the defendants in error are entitled at least to recover nominal damages.

It was insisted in the lower court, and the insistence is repeated here, that under the evidence adduced, and upon the rule of law invoked by the defendants in error, they were entitled to recover all the special damages claimed in their declaration. It is conceded by their counsel, at least by implication, that their right to a recovery of these damages is conditioned upon notice having been brought home to the railroad that a breach of its contract for prompt delivery would result in a loss to them such as is here sued for. The evidence upon which they rely as showing the existence of such notice is found in the testimony of Mendenhall, who, as the agent of Johnson & Fleming, delivered this outfit to the railroad company at Grenada for shipment. He testified that, when he made the delivery, he said to the agent of the company that the defendants in error needed the pipe (constituting a part of this outfit) very badly, that they were putting in another well at some place in Arkansas, and they wanted to ship this pipe in a boat. The attention of the witness is again called to this matter, and he is asked the following question: "Please state to the jury precisely what you said to the agent and what the agent said to you. Can you recall precisely what you said to the agent and what the agent said to you?" When he made the following answer: "Well, when I went up to get the car, I told the agent we'd like to have a drop-end door car to get this pipe in, and I remember distinctly he could not give me one, so I put up a derrick to load this pipe with, and remember pulling the pipe with a sliding line, and when I went to get the bill of lading from him I told him we needed this pipe very badly.

* * * Mr. Johnson was there the day before, and wanted this pipe right away, and when he told me he wanted this pipe he told me to put this engine in. I broke it about a month before, and he wanted to have it overhauled and use it on another job, and I told the agent we wanted this pipe right away, to give me a car as quick as he could, and he said 'all right,' and gave me a bill of lading, and the car was shipped out that same night." He reiterates, in answer to a question immediately succeeding, that this was all he told the agent.

The rule which the plaintiffs below invoke, and upon which they rely in this court, is that announced in *Hadley v. Baxendale*, 9 Ex. 341. This rule has been so frequently quoted and applied in the opinions of this court that it is unnecessary to set it out literally here. It is sufficient to say that under this rule a party who sues for a breach of contract is entitled to recover damages which result from that breach according to the usual course of things, or such as may be reasonably supposed to have

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been in the contemplation of both parties at the time the contract was made at the probable breach of it. Under the latter branch of the rule it has been universally held that in order to recover special damages, such as are claimed by the defendants in error in this case, the party against whom recovery is sought must have had such notice as would give him to understand that a breach of the contract would probably result to the other party in these special damages. In *Machine Company v. Compress Company*, 105 Tenn. 187, 58 S. W. 270, where this rule was enforced, it was insisted by the plaintiff in error, against whom it was applied, that granting the authority of the rule, yet that was not a proper case for its application, because the plaintiff in error was not sufficiently put on notice of the extraordinary damages it might incur from a breach of the contract. To this the court made reply: "No case holds, in order to put this rule in operation, that the party invoking it must have said to the other party at the moment of making the contract he would claim these damages for a breach, but it may be conceded the knowledge must be brought home to the party sought to be charged under such circumstances, that he must know that the person he contracts with naturally believes that he accepts the contract with a special condition attached * * * or, as is said by Mr. Sedgwick, 'notice must be more than knowledge on the defendant's part of the special circumstances. It must be of such a nature that the contract was, to some extent, based upon the special circumstances.'"

After thus interpreting the rule, the court proceeded to examine the testimony on this point, and sets the same out in the opinion, from which it distinctly appears that the agent of the machine company, for whose default the suit was brought, thoroughly understood at the time of taking the contract the purpose that the compress company had in view in making the contract, and the necessity of strict compliance with the same. It was upon this testimony, which clearly showed that the machine company was put on distinct notice of the consequences of a breach of its contract, that the rule of special damages was enforced in that case. This is equally so as to the case of *Railroad v. Cabinet Company*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729. There the railroad was held liable for special damages resulting from negligent delay in delivering goods, because at the time of the receipt of the goods for transportation it had notice that they were shipped upon a penalty contract. These, and many other cases, are reviewed in *Chisholm v. U. S. Canopy Co.*, 111 Tenn. 204, 77 S. W. 1062. So it may be said that it is settled in this state that one who seeks to recover special damages for the breach of a contract must be prepared to show that such damage was within the contemplation of both parties to the contract, and that in the absence of notice the party complaining must content himself with such damages as in the usual course of things flow from the breach of such a contract.

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The fact out of which the controversy grew in *Hadley v. Baxendale*, was that plaintiffs were the owners of a steam mill in which there was a broken shaft. This they gave to the defendant carrier to take to the engineer to serve as a model for a new one. On making the contract the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent back immediately. He delayed its delivery. The shaft was kept back in consequence, and in an action for breach of contract the plaintiffs claimed as special damages the loss of profits while the mill was kept idle. It was held in that case that the carrier could not be made responsible to such an extent, as it did not appear that he knew that the want of the shaft was the only thing which was keeping the mill idle. In line with that case, and bottomed on it, are many English and American cases all holding to the same view. These cases are referred to and cited as authority for the text to be found in *Sedgewick on Damages*, *Sutherland on Damages*, and other works on their general subject.

In view of the rule and of the many illustrations of it to be found in the various cases which we have had occasion to examine, we are satisfied that it cannot be said that it was within the contemplation of these parties at the time of the delivery of this outfit for shipment at Grenada that a breach of the contract of prompt delivery would visit upon the carrier the heavy special damages which are claimed in this lawsuit. If the witness Mendenhall is correct when he undertakes to give the precise or exact statement which he made to the agent of the railroad when this outfit was shipped—that this was needed very badly—then, as a matter of course, such statement gave no notice whatever to the carrier that there was a time contract made by Johnson & Fleming for the boring of a well at Blytheville, or any other contract which would be disappointed by a failure of prompt delivery of this material. But, referring to the testimony of the witness in another place, where he says he told the agent of the railroad that the parties were needing the pipe very badly, that they were putting in another well some place in Arkansas, no more, do we think, was the carrier put on notice. By this statement the carrier was not made to understand that these consignees, Johnson & Fleming, had a contract for the boring of a well in Arkansas which would be forfeited in the event of a failure to promptly deliver. In fact, the railroad was not given to understand by this statement that these parties were boring a well for other persons than themselves. Upon such a loose and indefinite statement made to the carrier, it would seem, upon all the authorities, that for the breach of the contract upon his part the shippers would be debarred from a recovery of special damages, and would be compelled to content himself with such as would naturally flow from a breach. But it is insisted that whatever may be the defect as to notice at the time of delivery, yet the railroad authorities were notified distinctly at Memphis, while the search was being made for this lost outfit, that these parties did have a

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time contract for the boring of a well in Arkansas, and that this material was essential to the doing of the work, and that the delay in its delivery would likely result in the cancellation of the contract and the heavy damage for which they now seek a recovery. We think the law is otherwise. Notice to the carrier, after goods have been shipped, of circumstances which render special damages a probable consequence of delay, does not affect the original contract so as to render the carrier liable for such damages, although the subsequent delay is unreasonable. *Bradley v. Chicago, etc., R. R. Co.*, 94 Wis. 44, 68 N. W. 410; *Missouri, etc., R. Co. v. Belcher* (Tex. Sup.) 35 S. W. 6; *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 275, 79 S. W. 1052.

In *Crutcher v. Choctaw, etc., R. Co.* (Ark. 1905) 85 S. W. 770, Am. & Eng. R. R. Cases (N. S. 39) 661, the court says: "It is contended by appellant that notice given to the carrier, after the making of the contract and shipment of the property, of the special circumstances, is sufficient to charge the carrier with the indorsed damages. This is not correct. The notice must be given at the time, or before, the making of the contract. In *Hook Smelting Co. v. Planters' Compress Co.*, supra, the court said: 'For it is well settled that, in order to make a party to the contract liable for special damages, he must have notice of the special circumstances at or before the making of the contract. He must, at the time he received notice of the facts showing that upon a breach he will be subject to special damage, be free to insist upon such additional compensation as he may choose to demand. But, if the price for the work, or for the part in which he is most interested, has been fixed so that he must go ahead with the contract, then notice of the circumstances will have no effect to enlarge his liability.'"

While it may be true, as stated in the citation found in the brief of counsel for Johnson & Fleming from 5 Am. & Eng. Encyc. of Law, p. 394, that whether or not the carrier had notice of the special circumstances which are relied on as a ground for the damages (special) claimed, is usually a question of fact for the jury to determine. This, however, is not so where the testimony with regard to the notice is incontrovertible and is clear and distinct. It is then a question of law for the court. It has been quite often held that contributory negligence is ordinarily a question to be determined by a jury, but when the testimony on the subject bears but one interpretation, which all reasonable minds would accept, then it becomes a question of law for the court. In the present case the evidence already set out is uncontroverted, and leaves nothing for the jury on the question of notice to be determined. It appeals alone to the court to be settled as a question of law.

But it is said by the same counsel that the nature of this shipment was of itself equivalent to notice. We are unable to see how the mere delivery of iron piping, etc., would have suggested in the remotest degree to the agent of the railroad the existence

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of a contract for the boring of a well. For their contention on this point Johnson & Fleming, through their counsel, refer to *I. C. R. R. Co. v. Cobb*, 64 Ill. 143. In that case, however, it appeared that the defendant carrier knew that certain corn intrusted to it for transportation was to be sold to the government at a certain price. The corn was damaged en route through a delay in transportation, and the plaintiff was obliged to sell it at the same price for which he had bought it. The court held that the measure of damages recoverable was the difference between what he received for the corn and the price at which he had contracted to sell it. It will be seen from this statement that the carrier at the time of the receipt of the corn had actual knowledge of the contract of sale, and was properly chargeable, therefore, upon that knowledge with the special damage resulting to the plaintiff from failure to promptly transport and deliver. We are equally unable to find any authority for the contention of the plaintiff below in the case of *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458. On the part of the plaintiff in error it is insisted that the verdict in the present case is without material evidence to support it. As has already been said, the piping and tools which had been shipped from Grenada, Miss., to Memphis, Tenn., constituted a part of a well-boring outfit belonging to Johnson & Fleming; the remainder of the outfit being at that time at Blytheville, in Arkansas. It will be seen from the verdict heretofore set out that the jury allowed the plaintiffs below \$880 for rental of equipment. The witness Johnson stated that the net rental value of a well-boring outfit was \$22 per day. The jury evidently allowed these parties as the rental this amount for the 40 days between the date when the property shipped should have been delivered and the time of its tender; that is, 40 days. In other words, they allowed a rental value for the complete outfit when this railroad had never in its keeping any save a part of that outfit, and as to that part the witness Johnson distinctly testified that taking it apart from the whole it had no rental value whatever. So the counsel of the plaintiff in error properly moved the court, upon this statement, to exclude this testimony from the jury. This the court declined to do, and in so declining was in error; for it is apparent that the railroad for its delay was only liable for the usable rental value of the property which it had in keeping. Excluding this testimony, the verdict upon this point was left without any material evidence to support it.

In addition to the railroad being only liable for the usable rental value of the property, which it received and failed to deliver within a reasonable time, if any such value can be made out, we think it clear it was not liable for the difference between the value of the property which it had in charge and the amount which Johnson & Fleming had to expend for new machinery to supply its place. It is well settled that the consignee cannot, by declining to receive from the carrier a delayed shipment, convert him into a tort-feasor and hold him liable in trover for the value of the property. If this is so, we cannot understand how.

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by indirection, he can reach the same result as he would if allowed to reject the shipment and charge the carrier with the difference in value of the rejected stock and the amount paid for the new. The evidence on this point was incompetent, and the verdict in favor of plaintiffs below for \$166 was unwarranted.

The judgment of the lower court is reversed, and the cause is remanded.

BOWDON v. ATLANTIC COAST LINE RY. CO.

(Supreme Court of Alabama, May 17, 1906.)

[41 So. Rep. 294.]

Carriers—Termination of Relation—Arrival of Goods.*—The liability of a common carrier is not necessarily terminated by the arrival of the goods at destination, but such liability ceases and that of a warehouseman begins only after the owner or consignee has had a reasonable time after the arrival at destination to remove the goods.

Same—Refusal to Deliver—Absence of Waybill—Excuse.—Failure of a delivering carrier to have a waybill for the freight shipped furnished no ground for such carrier's refusal to deliver the goods to the owner and consignee after arrival, on demand.

Same—Loss of Goods—Action—Evidence.—Where, in an action against a carrier for loss of goods destroyed in the delivering carrier's depot, defendant claimed that the goods had been destroyed by fire after the expiration of a reasonable time within which the consignee should have removed them, and after defendant had refused to deliver when delivery was first demanded because no waybill had been received from the initial carrier, it was competent for plaintiff to show that the delivering station was a prepay station, and that it was the custom of defendant's agent to deliver freight at such station to the owner or consignee without requiring the production of a bill of lading.

Appeal from Circuit Court, Houston County; William C. Oates, Special Judge.

"To be officially reported."

Action by C. P. Bowdon against the Atlantic Coast Line Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

This was an action to recover damages for failure to deliver 144 pairs of shoes alleged to have been shipped over plaintiff's line as a common carrier and the failure to deliver the same at the point of shipment. The defendant set up by its pleas that the goods were consigned to Gordon, Ala., a town of less than

*For the authorities in this series on the question, when the carrier's liability as a common carrier terminates after the arrival of the freight at its destination, see foot-notes appended to *Kenny Co. v. Atlanta & W. P. R. Co.* (Ga.), 17 R. R. R. 638, 40 Am. & Eng. R. Cas., N. S., 638; *Vaughn v. New York, etc., R. Co.* (R. I.), 17 R. R. R. 94, 40 Am. & Eng. R. Cas., N. S., 94; foot-notes appended to *Walters v. Detroit United Ry. Co.* (Mich.), 16 R. R. R. 658, 39 Am. & Eng. R. Cas., N. S., 658; foot-note appended to *Southern Ry. Co. v. Aldredge & Shelton* (Ala.), 16 R. R. R. 519, 39 Am. & Eng. R. Cas., N. S., 519.

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for failure as a common carrier to deliver certain goods described in the complaint. The defendant sought to avoid liability by setting up as a defense that at the time of the destruction of the goods by fire its duty as a common carrier had terminated and that of a warehouseman had begun and that the fire which destroyed the goods was without fault or negligence on the part of the defendant. The rule of law is well settled in this state that the liability of a common carrier is not necessarily terminated by the arrival of the goods at the point of destination, but that such liability ceases and that of warehouseman begins only after the owner or consignee of the goods shipped has had a reasonable time after arrival at the point of destination to remove the same. *C. & W. Ry. Co. v. Ludden & Bates*, 89 Ala. 612, 7 South. 471; *Kennedy Bros. v. M. & G. R. R. Co.*, 74 Ala. 430; *Ala. & Tenn. River Ry. Co. v. Kidd*, 35 Ala. 209; *M. & G. R. R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *L. & N. R. R. Co. v. Oden*, 80 Ala. 38; *L. & N. R. R. Co. v. McGuire & Co.*, 79 Ala. 395; *Hutchinson on Carriers*, pp. 356, 358, 359, 378, 379.

Neither of the defendant's pleas Nos. 2 and 3 averred that the plaintiff had had a reasonable time for the removal of the goods in question after their arrival at the point of destination of their shipment. These pleas, therefore, were subject to the grounds of plaintiff's demurrer directed to this defect in the pleas, and the demurrers should have been sustained.

The failure of the defendant railroad company to have a waybill for the freight shipped could furnish no excuse for the failure of the defendant to deliver to the owner and consignee the goods when he called for the same. That the receiving carrier failed to furnish the delivering carrier with a waybill of the goods shipped was no sufficient reason for a refusal by the delivering carrier to deliver the goods to the owner and consignee when he demanded the same.

Under the issues on which the case was tried, it was competent for the plaintiff to show that the railroad station at Gordon was a prepay station, and it was likewise competent for the plaintiff to show that the freight on the goods in question had been prepaid. It was also competent for the plaintiff to show existence of a custom for the railroad agent to deliver freight to the owner or consignee without requiring the production of the bill of lading.

For the errors pointed out, the judgment appealed from will be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

ROY & ROY v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, April 19, 1906.)

[85 Pac. Rep. 53.]

Carriers—Bills of Lading—Negotiability—Bona Fide Purchasers.*—

The act of a carrier's agent in delivering a bill of lading for goods which he knew were not delivered to the carrier, being beyond his authority, does not bind the carrier, even as to an innocent transferee or pledgee, notwithstanding Ballinger's Ann. Codes & St. § 3598, making bills of lading negotiable by indorsement for certain purposes.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by Roy & Roy, a corporation, against the Northern Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Wright & Kelleher, for appellant.

Carroll B. Graves, for respondent.

CROW, J. This action was instituted by the appellant, Roy & Roy, a corporation, against respondent, Northern Pacific Railway Company, a corporation, upon two certain bills of lading claimed to have been issued by said respondent for two car loads of shingles. The complaint contains two causes of action; but, as the questions raised thereby are identical, we will state the first cause only. The complaint, for the first cause of action, alleges that on November 23, 1903, the respondent, through its agent at Ravensdale, Wash., issued and delivered to one W. J. Doucett a certain bill of lading, acknowledging the receipt of 231¼ M. 16 5x2 clear shingles, shipped from Covington, Wash., on said date, to Eaton Prairie, Minn., billed from the Allen Shingle Company to Roy & Roy, the appellant; that in truth said respondent had not received from said Allen Shingle Company, or said Doucett, or any other person, said shingles, or any shingles, at the time of the issuance of said bill of lading, and that there were no shingles loaded on the car named therein; that said Doucett was not the agent of the said Allen Shingle Company, had no authority to bill or ship any shingles for said company, and was not the owner or in control of any shingles for said company, all of which facts were at the time well known to respondent, or could have been learned by the most casual in-

*For the authorities in this series on the subjects of the negotiability and transfer of bills of lading, see foot-notes appended to *Vaughn v. New York, etc., R. Co.* (R. I.), 17 R. R. R. 94, 40 Am. & Eng. R. Cas., N. S., 94; *General Elec. Co. v. Southern Ry.* (S. Car.), 17 R. R. R. 76, 40 Am. & Eng. R. Cas., N. S., 76.

For the authorities in this series on the question whether bills of lading are conclusive as to matters stated therein, see foot-note appended to *Swedish-American Nat. Bank v. Chicago, etc., Ry. Co.* (Minn.), 19 R. R. R. 783, 42 Am. & Eng. R. Cas., N. S., 783; *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787.

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quiry; that on November 21, 1903, said Doucett presented said bill of lading to the appellant, Roy & Roy, who, relying upon the representations therein contained, and believing respondent had said shingles in its possession, paid to said Doucett the sum of \$326.34, the value of said shingles; that by reason of the negligence of the respondent in issuing said bill of lading to said Doucett he was enabled to defraud appellant out of said sum of \$326.34; that said Doucett is wholly insolvent; and that prior to the commencement of this action appellant demanded that respondent repay the said sum of \$326.34, or deliver said shingles to it, which the said respondent refused to do. To each cause of action of the complaint the respondent interposed a general demurrer, which being sustained, the appellant refused to plead further. Thereupon judgment was entered dismissing the action, and this appeal has been taken.

The principal question to be determined on this appeal is whether the respondent railway company is liable to appellant for the value of said shingles. The appellant has affirmatively pleaded that no shingles were ever received by respondent, thus showing the false and fraudulent character of the recitals contained in the bill of lading. But, as it was issued by one H. S. McIntyre, respondent's agent at Ravensdale, who was authorized to issue bills of lading for merchandise actually received for shipment, appellant contends that the respondent is estopped from relying upon the defense that it received no shingles, not only because it held out McIntyre, its agent, as having full authority to issue such bill of lading, but for the further reason that said bill of lading as executed is negotiable and transferable by indorsement and delivery, under the laws of this state and the usages and customs of merchants and shippers generally, and that appellant, relying upon said bill of lading and on the truth of its recitals and believing the shingles had been actually delivered to respondent, paid to said Doucett the value of said shingles, and thereby became an innocent purchaser for value. Appellant, in support of its contention, has cited numerous authorities, including *Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; *Brooke v. New York, etc., R. Co.*, 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; *Armour v. Mich. Cent. Ry. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; *Dickerson v. Seelye*, 12 Barb. (N. Y.) 99; *Wichita Savings Bank v. Atchison, etc., R. Co.*, 20 Kan. 519; *Watson v. M. & C. R. Co.*, 56 Tenn. 255; *Bank of Batavia v. N. Y., L. E. & N. R. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; *St. Louis & Iron Mountain R. R. Co. v. Larned*, 103 Ill. 293; *Smith v. Missouri R. R. Co.*, 74 Mo. App. 48. These cases are cited here upon the theory that, as the agent, McIntyre, was employed by respondent to receive goods for shipment and to issue bills of lading therefor, and as he as such agent actually issued the bill of lading in question, containing a recital of the receipt of the shingles, as between respondent and appellant, an innocent third party, who has acted in good faith while relying upon said re-

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cital, the respondent should be estopped from denying the truth of its statements, and from making the defense that the shingles had not been actually received. It is true that the authorities above cited sustain appellant's position. Still we find that the English courts, the Supreme Court of the United States, the federal courts generally, and many of the state courts have in numerous well-considered cases announced an entirely opposite doctrine, which we will now announce as the law of this state. Where a transportation company shows that merchandise was not actually received by it, and that a bill of lading has been issued by its agent, either through fraud or mistake, the Supreme Court of the United States, since followed by other courts, has held that, as the receipt of the goods lies at the foundation of the contract to carry and deliver, there can be no such contract, unless the goods have actually been received, and that an agent of the carrier has no authority to issue a bill of lading without actual receipt of the goods, and cannot bind the carrier, even as to an innocent transferee or pledgee of the bill of lading. 6 Cyc. 419; *Grant v. Norway*, 10 C. B. 664; *Uessel v. Bath*, 2 Exch. 267; *Meyer v. Dresser*, 16 C. B. (N. S.) 646; *Brown v. Powell Coal Co.*, L. R. 10 C. P. 562; *Cox v. Bruce*, 18 Q. B. Div. 147; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *Friedlander v. Texas, etc., Ry. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Lazard v. Merchants', etc., Trans. Co.*, 78 Md. 1, 26 Atl. 897; *The Loon*, 7 Blatchford, 244, Fed. Cas. No. 8,499; *Robinson v. Memphis & C. K. Co. (C. C.)* 9 Fed. 129; *Id.*, 16 Fed. 57; *Martin v. Railway Co.*, 55 Ark. 524, 19 S. W. 314; *Sears v. Wingate*, 3 Allen (Mass.) 103; *Hunt v. Miss. Cent. Co.*, 29 La. Ann. 446; *Louisiana Ntl. Bank v. Laveille*, 52 Mo. 380; *Ntl. Bank of Commerce v. R. R. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; *Black v. Wilmington, etc., R. Co.*, 92 N. C. 42, 53 Am. Rep. 450; *Hazard v. Ill. Cent. R. R. Co.*, 67 Miss. 32, 7 South. 280; *Dean v. King*, 22 Ohio St. 118.

The appellant, however, not only relies upon the doctrine of estoppel, but also contends that the bill of lading was negotiable, and that it, as an innocent purchaser for value, should be protected, citing *First Ntl. Bank of Pullman v. N. P. Ry. Co.*, 28 Wash. 439, 68 Pac. 965. While our statute (Ballinger's Ann. Codes & St. § 3598) makes a bill of lading negotiable by indorsement for certain purposes, it is not negotiable in the same sense as promissory notes, bills of exchange, or other commercial paper. In *First Ntl. Bank v. N. P. Ry. Co.*, supra, we only held that a carrier issuing a bill of lading is bound to make delivery of the goods represented thereby to the holder thereof; in other words, that the assignment of the bill of lading confers upon the assignee such title to the goods as may have been held by the party to whom the bill of lading was originally issued. In *Yarwood v. Happy*, 18 Wash. 246, 51 Pac. 461, we in substance held that our statute was only declaratory of the previous common-law rule concerning bills of lading, and should not be con-

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strued as making an indorsement effective for any purpose other than to transfer the property represented, citing with approval *Shaw v. Merchants' Nat. Bank of St. Louis*, 101 U. S. 557, 25 L. Ed. 892, in which the Supreme Court of the United States said: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes." The negotiable character of a bill of lading is discussed in *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998, where Justice Miller says: "A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense. It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." In *Lazard v. Merchants', etc., Co.*, 78 Md. 13, 26 Atl. 897, the Court of Appeals of Maryland said: "No principle is better settled by the commercial law than that neither the master of the ship nor the agent of a transportation company has the right to sign bills of lading until they have been actually put on board of the ship or delivered into the possession of the company. And, if a master or agent signs a bill of lading for goods which have not been delivered to the carrier, the owner of the ship or other means of transportation is not liable either to the shipper or to one dealing with or making advances in good faith upon the bill of lading. It is hardly necessary to say that bills of lading are not by the commercial law negotiable in the same sense as bills

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of exchange and promissory notes. They are merely the evidence of ownership, general or special, of the property mentioned in them, and the right to receive said property at the place of delivery; and one making advances of money upon them does so at his own risk, and with notice of the limitation as to the power or rights of the master or agent to sign the same." In *The Carlos F. Roses*, 177 U. S. 665, 20 Sup. Ct. 807, 44 L. Ed. 929, Chief Justice Fuller said: "Bills of lading stand as the substitute and representative of the goods described therein, and, while quasi negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferrer's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it." See, also, *Friedlander v. Texas & Pac. Ry. Co.*, 130 U. S. 424, 9 Sup. Ct. 570, 32 L. Ed. 991; *Anderson v. Portland Flouring Mills (Or.)* 60 Pac. 839, 50 L. R. A. 235, 82 Am. St. Rep. 771.

We cannot adopt the doctrine of estoppel as contended for by the appellant. Respondent's agent only had authority to issue bills of lading for goods actually received for transportation, but had no authority to issue any such bills for goods not received. The railroad company was not a broker dealing in bills of lading, but was only engaged in the business of transporting goods and merchandise. This fact was well known to the shipping public. Those who dealt with the respondent knew that its business was that of transportation only. When a bill of lading issued by it is assigned to a third party, who purchases the same or makes advances thereon, such third party is presumed to have knowledge of these conditions. One who purchases a bill of lading does it at his own risk, and must know that the company will be permitted to show that the goods were never received by it, if such be the fact. If, therefore, a transportation company is able to show that a certain bill of lading has been fraudulently or erroneously issued, no goods having been actually received for shipment, such showing will constitute a complete defense against any liability upon its part to a bona fide purchaser or holder. It was not necessary for respondent to plead such defense in this case, as all the essential facts appear upon the face of the complaint. In *Friedlander v. Texas & Pac. Ry. Co.*, 130 U. S. 424, 9 Sup. Ct. 572, 32 L. Ed. 991, Chief Justice Fuller says: "It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent pur-

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chaser. *The Freeman v. Buckingham*, 18 How. (U. S.) 182, 191, 15 L. Ed. 341; *The Lady Franklin*, 8 Wall. (U. S.) 325, 19 L. Ed. 455; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998. And this agrees with the rule laid down by the English courts. *Lickbarrow v. Mason*, 2 T. R. 77; *Grant v. Norway*, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B. D. 147. 'The receipt of the goods' said Mr. Justice Miller, in *Pollard v. Vinton*, *supra*, 'lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.' 'And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea,' as was said by Mr. Justice Matthews in *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 87, 7 Sup. Ct. 1132, 30 L. Ed. 1077; he adding also: 'If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182, 15 L. Ed. 341, and *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998.' It is a familiar principle of law that, where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading. They are carriers only, and held to rigid responsibility as such."

While there is some conflict on the question of the respondent's liability in the decisions of the various state courts, we find no such conflict in the decisions of the federal courts, which uniformly hold respondent not liable. We not only think the current of authority sustains the position assumed by the respondent here, but also feel that in announcing our opinion we should act in harmony with the federal courts. This was the view taken by the Supreme Court of Minnesota in the case of *National Bank of Commerce v. R. R. Co.*, *supra*, where it said: "But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law, the federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the federal courts. The inconvenience and confusion that would

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follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens." We think the complaint failed to state a cause of action, and that the trial court committed no error in sustaining the demurrer.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, HADLEY, ROOT, and DUNBAR, JJ., concur.

RAILROAD COM'RS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Feb. 26, 1906. On Rehearing, April 9, 1906.)

[54 S. E. Rep. 224.]

Mandamus—Review—Findings of Railroad Commission—Scope of Inquiry.—Findings of fact by the railroad commission after due hearing will not be reviewed by the Supreme Court in the absence of allegations of fraud or other grounds for setting aside the adjudication.

Railroads—Regulations—Stopping Fast Mail—Interstate Commerce.*—Where the railroad commissioners have determined that the accommodations furnished citizens of the state at a station in the state by an interstate railroad company are inadequate, its order requiring the company to stop two of its fast mail trains transporting interstate passengers at such station on flagging is not a burden on interstate commerce, and mandamus will issue to compel the trains so to stop, the writ being so framed as to give the railroad company the alternative right to provide facilities substantially the same as would be afforded the people at such station by stopping the fast mail trains on flag.

Petition of the railroad commissioners for writ of mandamus against the Atlantic Coast Line Railroad Company. Writ granted.

Leroy F. Youmans, Asst. Atty. Gen., and M. C. Woods, for petitioners.

Willcox & Willcox, Mullins & Hughes, and Johnson & Buck, for respondent.

This is an application to the Supreme Court, in the exercise of

*For the authorities in this series on the subject of state regulation of interstate commerce, see foot-notes appended to *United States Exp. Co. v. State* (Ind.), 18 R. R. R. 73, 41 Am. & Eng. R. Cas., N. S., 73; foot-notes appended to *Illinois Cent. R. Co. v. Mississippi R. Comm'n* (C. C. A.), 17 R. R. R. 544, 40 Am. & Eng. R. Cas., N. S., 544; foot-notes appended to *Railroad Com'rs v. Atlantic C. L. R. Co.* (S. Car.), 17 R. R. R. 505, 40 Am. & Eng. R. Cas., N. S., 505.

For the authorities in this series on the subject of the enforcement of the orders of railroad commissions by mandamus, see foot-notes appended to *Railroad Com'rs v. Atlantic Coast Line R. Co.* (S. Car.), 17 R. R. R. 505, 40 Am. & Eng. R. Cas., N. S., 505.

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its original jurisdiction, for a writ of mandamus, requiring the respondent to stop two of its fast mail trains when flagged, in order to provide adequate facilities to the citizens of Latta and surrounding country, in making certain railroad connections. The petition alleges: "That on June 7, 1904, certain citizens residing at Latta and along the line of the Latta Branch Railroad, filed a petition with the plaintiffs as railroad commissioners alleging that the Atlantic Coast Line Railroad Company was furnishing insufficient accommodations for passengers traveling on said railroad, and asking that the said railroad company be compelled to stop its passenger trains, Nos. 32 and 35, at its station in the town of Latta when flagged, for the purpose of receiving and delivering passengers at said station. That thereafter, on July 29, 1904, the said railroad commissioners, after investigating the facts stated in said petition, and after notice and hearing the above-named defendant in reference to the facts of said petition found as a matter of fact that sufficient accommodation was not furnished the citizens along the said Latta Branch Railroad, and in the town of Latta, by the Atlantic Coast Line Railroad Company at its station in Latta, and said railroad commissioners thereupon made an order that the said passenger trains, Nos. 32 and 35, operated by the said Atlantic Coast Line Railroad Company, should stop when flagged, at the said Latta station, on and after August 1, 1904." The respondent contends that sufficient passenger accommodations are now furnished the citizens of Latta and those residing along the Latta Branch Railroad, and relies upon the defense "that said order of the railroad commission of South Carolina is unreasonable, unnecessary, a direct burden upon interstate commerce, and, therefore, a violation of and in conflict with section 8, of article I., of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several states, and further, that said order is a direct and unnecessary interference with the speedy carriage of mails of the United States." The testimony was taken by a special referee under order of the court.

The decision of the commissioners is set forth in the following notice served upon the general superintendent of the railroad company: "Dear Sir: We beg to hand you herewith the finding and order of this board in the matter as set forth, as follows: On petition of the town authorities of the towns of Latta and Clio and citizens along the Latta Branch Railroad for the stopping of trains Nos. 32 and 35 on flag, for receiving and delivering passengers at said station. After personal inspection of the situation at Latta, and the demand of said citizens for those accommodations, it appears to this board that sufficient accommodation was not furnished to those citizens to fulfill the requirements of the statutes of this state. The evidence was sufficient to warrant this board in demanding that better accommodation should be furnished, and that it was not unreasonable to ask the said company to stop trains Nos. 32 and 35 on flag.

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Therefore it is hereby ordered that said trains shall stop on flag, at said Latta station, on and after August 1st."

The attorney who filed an argument in behalf of the petitioners, thus states the reasons why the accommodations are considered insufficient: "Any inconvenience arising to passengers at Latta necessarily arises to passengers from Clio and the territory adjacent to the railroad between the two places, a distance of twenty miles, passengers from Clio and the stations between the two places having to pass through the junction point, Latta. Hence, there are involved not only passengers from Latta, but from a large territory, which, as it appears from uncontradicted testimony, is a progressive, prosperous and thickly settled section. A passenger at Latta may take a train at 8 a. m. and go to Dillon on the Latta Branch train. This train returns immediately and passing Latta, goes to Pee Dee junction, where connection may be had for Charleston and points on the Cheraw and Darlington road and Wilmington and immediate points. The Latta Branch train returns from Pee Dee forthwith, and, after a wait of two or three hours at Latta, goes to Clio. The morning express, a local train, arrives at 10:45 a. m. for points north. During the day at some indefinite time local freight trains pass, one going north and the other south. In the afternoon the express, a local passenger, goes south, making connection with all points south of Latta, including Columbia. This is the only Columbia connection. The Latta Branch train returns from Clio and goes down to Pee Dee just behind the local passenger. It returns from Pee Dee and goes up to Clio, where it rests for the night. Thus there arrive and depart from Latta two passenger trains, the Latta Branch train five times and two freights, aggregating nine trains per week day. On Sunday there are only two trains. With all these trains there is only one connection per day north to Dillon and points beyond. The stopping of train 32 would remedy this. There is only one connection to Columbia, and passengers for points beyond Columbia have to remain over night and pay a hotel bill, either in Florence, Sumter, or Columbia. There is no connection for Orangeburg and points between Sumter and Augusta, absolutely none, without having to pay a hotel bill and being put to inconvenience and delay. The stopping of train 35 would correct all this."

The following testimony of the general superintendent of the respondent gives a clear outline of the grounds upon which it contends that the facilities are adequate. "Q. In describing these connections which are afforded to Clio, S. C., are not all the connections you have described also afforded Latta, S. C.? A. Yes, sir. Q. Do you know the last census population of Latta, S. C.? A. Yes, sir; I have it taken from the United States Census, a copy of which I have. The population, according to the census of 1900, was 453. Q. What was the population of Clio? A. 508. Q. What is the population of intermediate points between Clio and Latta? A. The only point shown is Dunbar, 115 people; the United States Census Report

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showing that the other points are less than 50 population, and are, therefore, not given. Q. What is the census population of Kingstree, S. C.? A. 760 people. Q. How many passenger trains a day, in all directions, afford to the people of Latta, S. C., an opportunity of going off by boarding a train? A. 11. The following trains arrive at Latta: from Clio at 7 a. m., 6:05 a. m.; from all points south, 10:30 a. m.; from Dillon, 7:50 a. m.; from Pee Dee and points beyond, 9:35 a. m. and 9:05 p. m. The following trains depart from Latta: for Clio, 11:15 a. m. and 9:18 p. m.; 7:01 p. m. for Wilmington and points south and west; 8:30 a. m., Pee Dee and points beyond, and 7:40 p. m. for Pee Dee and points beyond. In addition to which there are two local freight trains provided with passenger service, leaving Latta at 9 a. m. for Fayetteville and intermediate points, and at 7:01 p. m. for Florence and intermediate points. Q. Is it not a fact, Mr. Craig, that the only one connection that it not made either in the morning or afternoon by the trains that you have described, is the train which leaves Florence at 8 a. m. for Columbia, S. C.? A. That train only runs to Sumter, but it affords connection at Sumter. Q. Is or not that the only train that the two trains that you have described do not make connection with? A. Yes, sir." It also relies upon the fact that trains Nos. 32 and 35 already stop at Dillon, which is only six miles from Latta.

GARY, A. J. (after the foregoing statement of facts). On the former hearing before this court (50 S. E. 641) the respondent interposed a demurrer to the petition which was overruled. One of the grounds of demurrer was: "In that the order of the railroad commission is not the result of a judicially determined fact, and the defendant not having had its day in court on the merits of said order, the enforcement of the order of railroad commission deprives the defendant of its property without due process, etc."

1. The court, in disposing of this ground of demurrer, said: "The facts were determined by a tribunal well recognized and adopted throughout the land. The defendant was notified, appeared, and contested the facts upon the merits." As the facts were judicially determined by a tribunal, empowered by statute to make such adjudication, they are not subject to review by this court, in the absence of allegation charging fraud or other grounds, for setting aside the adjudication.

2. Therefore, the question to be determined is whether the order of the commissioners, requiring the railroad company to stop at Latta (if flagged) its two fast mail trains engaged in carrying interstate passengers, was a burden upon interstate commerce, when the accommodations are otherwise inadequate. The mere fact that they are fast mail trains engaged in carrying interstate passengers, does not exempt them from regulation under the statute of the state.

In the case of *Lake Shore Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, the court had under consideration a

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statute of Ohio providing that "each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over 3,000 inhabitants, for a time sufficient to receive and let off passengers." At the time when it was contended that the statute was violated, the railroad company caused only one of its trains to stop as required by the statute although it was then operating three or more trains, both ways, over its roads; all of which, except the one that stopped at the station, were fast mail trains transporting interstate passengers. On the assumption that the statute was not unreasonable, the court held that the statute was constitutional, and used the following language, at page 300 of 173 U. S., page 471 of 19 Sup. Ct. (43 L. Ed. 702): "The power of the state, by appropriate legislation to provide for the public convenience, stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power granted to the general government is determined by the same rules. * * * The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo, without stopping at intermediate points, or only at very large cities on the route, if, in the contingency named in the statute, the required number of trains stop at each place containing 3,000 inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train and receive and let off passengers is only three minutes. Certainly the state of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the state between points outside of its territory. * * * It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the state without stopping. Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of the stockholders, and without taking into consideration the interests of the general public. It would mean, not only that such directors were exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of

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the public, but that the corporation could so regulate the running of its interstate trains as to build up cities and towns at the ends of its line or at favored points, and by that means destroy or retard the growth and prosperity of those at intervening points. It would mean also that, beyond the power of the state to prevent it, the defendant railway company could run all its trains through the state without stopping at any city within its limits, however numerous its population, and could prevent the people along its road within the state who desired to go beyond its limit from using its interstate trains at all, or only at such points as the company chose to designate. A principle that in its application admits of such results cannot be sanctioned.

The statute of Illinois (Acts 1875, p. 225, § 25, as amended), is as follows: "Every railroad corporation shall cause its passenger trains to stop upon its [their] arrival at each station advertised by such corporation as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: Provided, all regular passenger trains shall stop a sufficient length of time at the railroad stations of county seats, to receive and let off passengers with safety." This statute was held to be unconstitutional in the case of *Cleveland, etc., v. Illinois, etc.*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868. The court used the following language: "The question broadly presented in this case is this: Whether a state statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily, and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question. * * * While, as we held in the *Lake Shore Case*, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. * * * With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principles we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic and legislative interference therewith is unreasonable and the infringement upon that provision of the Constitution which we have held requires that commerce between the states shall be free and unobstructed." In commenting on the case of *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, the court says: "This case is readily distinguish-

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able from the one under consideration in the fact that the statute of Ohio required only that three regular passenger trains should stop at every station containing 3,000 inhabitants, leaving the company at liberty to run as many through passenger trains exceeding three per day as it chose, without restriction as to stoppage at particular stations. In other words, it left open the loophole which the statute of Illinois has effectually closed."

The court recognized the principle that it is the duty of the railroad company to provide, primarily, sufficient accommodations for those to whom it is directly tributary. From this doctrine, it follows as a necessary corollary, that it is only "after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic." The facts judicially determined by the commissioners show that the accommodations are inadequate, and that the citizens of Latta are entitled to relief. In seeking to give relief the commissioners have ordered trains Nos. 32 and 35 to stop when flagged. This court has reached the conclusion that the writ of mandamus should be issued; but in order that the respondent may have the opportunity of discharging its primary duty in the premises, without stopping trains Nos. 32 and 35 on flag, the writ will be so framed as to confer upon the railroad company the alternative right to provide facilities substantially the same as those which would be afforded the citizens of Latta by stopping trains Nos. 32 and 35 on flag.

It is the judgment of this court that the writ of mandamus be issued in accordance with the conclusions herein announced.

On Rehearing.

PER CURIAM. After consideration of the petition for rehearing in this case, the court is satisfied that no material principle of law or fact has been overlooked or disregarded.

It is therefore ordered that the petition for rehearing be dismissed, and the order heretofore granted staying the remittitur be revoked.

This case is now in Supreme Court of United States on writ of error.

BELL BROS. v. WESTERN & A. R. Co.

(Supreme Court of Georgia, May 16, 1906.)

[54 S. E. Rep. 532.]

Carriers—Injury to Freight—Action by Consignee.—When a consignee brings suit to recover damages for a neglect of legal duty arising under a special contract of affreightment made in his behalf by the consignor with a common carrier, the consignee is not at liberty to challenge the authority of the consignor to make the shipment under such a contract.

Same—Evidence—Documentary—Freight Receipt.—A freight receipt to which the name of a railway agent appears to have been signed by stencil is not admissible in evidence, without accompanying

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proof to show that he issued the receipt, or that its genuineness has been recognized by his principal.

Carriers—Connecting Carriers—Evidence.*—As the evidence upon which the plaintiff relied for a recovery disclosed that under the special contract of affreightment the liability of each of the connecting carriers was limited to loss or damage occurring on its line of road, and also that the delay which caused the loss complained of occurred before the shipment was turned over to the carrier sued, a nonsuit was properly granted.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Bell Bros. against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The firm of Bell Bros. brought suit in the city court of Atlanta against the Western & Atlantic Railroad Company, a common carrier, to recover the loss sustained by the plaintiff on a carload of cabbages shipped to that firm on September 21, 1900, by A. D. Freeman, of Rural Retreat, Va., and delivered by the defendant company to the plaintiff on September 29th in a condition unfit for market; the cabbages being then damaged and decayed. The defendant company was charged with having negligently allowed the car to stand on its side track in the city of Marietta, Ga., an entire day. The plaintiff further alleged that, when the shipment was delivered to the defendant company by its connecting carrier, the "defendant received said goods as in good order," though when the cabbages were received by plaintiff they were damaged, decayed, and unfit for market; the shipment not having been "delivered within a reasonable time, nor in the time usually consumed in conveying like shipments from Rural Retreat, Va., to Atlanta, Ga.," the point of destination. The defendant company filed an answer in which it made a general denial of all the allegations of fact upon which the plaintiff relied for a recovery. On the trial the plaintiff introduced in evidence a bill of lading, signed by A. D. Freeman, the consignor, and by the agent of the initial carrier, which set forth the terms of a special contract under which the shipment was made; one of the stipulations being: "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route." The court held that the plaintiff was bound by the terms of this special contract, entered into by the shipper in behalf of the plaintiff, and was therefore not at liberty to offer the testimony to show that A. D. Freeman was without authority to make shipment of the cabbages under such a contract. The plaintiff also offered in evidence a freight receipt for the car in which the cabbages were shipped,

*For the authorities in this series on the subject of the right of a carrier to limit its liability to its own line, see foot-notes appended to *Kibby v. Michigan Cent. R. Co.* (Mich.), 19 R. R. R. 757, 42 Am. & Eng. R. Cas., N. S., 757; foot-notes appended to *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88.

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signed by stencil, "J. H. Boston, Agent," dated September 26, 1900, and reciting that the shipment was "received in good order of the Atlanta, Knoxville & Northern Railway Company." The court rejected this receipt on the ground that, while J. H. Boston was shown to be the agent of the defendant company at Marietta, yet the plaintiff had failed to prove that the receipt had been signed by him, or was binding upon that company as an admission that the shipment was received in good order. It appeared, from a letter written by the company's claim agent and sent to the attorneys of the plaintiff, that the car was delivered to the defendant at 9 o'clock in the morning of the day it was received from the Atlanta, Knoxville & Northern Railway Company, and was forwarded to Atlanta by the first train thereafter, arriving there in the afternoon of the same day. After the plaintiff had introduced this letter and all the other evidence it had to offer, the court awarded a nonsuit.

Moore & Pomeroy, for plaintiffs in error.

Payne & Tye, for defendant in error.

EVANS, J. (after stating the facts). 1. The bill of lading issued by the initial carrier plays an important part in the plaintiff's case, whether the plaintiff relies on the count for the tort growing out of the breach of duty arising under the contract or on the count charging liability on the part of the defendant under Civ. Code 1895, § 2298, as being the last connecting carrier which received the goods as "in good order." In the first instance, though the consignee be not a party to a contract of carriage between a railroad company and a shipper, the consignee may make proof of such contract with a view to showing the company became liable to him for a failure to comply with its legal duty as a common carrier to perform such contract; and in the latter case the bill of lading is admissible to show receipt "in good order" of the goods by the initial carrier, and that they were to be transported over more than one railroad. The petition does not directly specify the consignor; but, as it does not contradict an inference of a shipment by the plaintiff firm, it was competent to show that the delivery of the cabbages was made to the initial carrier through an agent, notwithstanding such agent made the shipment in his own name without disclosing his principal. Yet, as the plaintiff bases the first count of its suit upon a breach of duty arising out of a contract made in its behalf, it is bound by the terms of the contract, irrespective of the question whether its agent had authority to enter into a contract of that character. *Central Ry. Co. v. James*, 117 Ga. 832, 45 S. E. 223. The plaintiff cannot rely on the contract to raise a duty, and at the same time disaffirm the agent's authority. If the consignor was without authority to make the contract of carriage, the plaintiff has ratified his act by predicated its suit upon a breach of duty growing out of that contract. Evidence of the consignor's lack of authority to sign

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the contract of carriage was irrelevant. The terms of the contract were neither unreasonable nor against public policy, and the contract was therefore legal and binding on the parties thereto. *Central R. Co. v. Avant*, 80 Ga. 195, 5 S. E. 78.

2. The freight receipt for the car in which the cabbages were shipped, signed by stencil with the name of the agent of the defendant company, was excluded from evidence because there was no proof that the receipt had been signed by the agent, not that it was binding upon the company as an admission that the shipment was received as "in good order." There was no proof that the agent actually signed the receipt or adopted the stencil signature, or that it was his custom to sign his name to receipts of this kind by stamp. There was no proof of the execution of the receipt, and it was properly excluded from evidence.

3. The special contract between the consignor and the initial carrier limited a recovery for loss or damage to the carrier in possession of the goods at the time of the injury, or whose conduct occasioned the loss or damage. This is true with respect to both counts in the petition. *Central R. Co. v. Avant*, supra; *Kavanaugh v. Southern Ry. Co.*, 120 Ga. 62, 47 S. E. 526. When a connecting carrier, who has completed the transportation and delivered the goods to the consignee in a damaged condition, is sued for the loss in value, upon proof that the initial carrier received the shipment in good order the jury have the right to infer that they continued in that condition down to the time of their delivery to the carrier making the delivery to the consignee, and that the injury or loss occurred while in his possession. *W. & A. R. Co. v. Exposition Mills*, 81 Ga. 523, 7 S. E. 916, 2 L. R. A. 102. *Forrester v. Georgia R. Co.*, 92 Ga. 699, 19 S. E. 811. If nothing more had appeared than that the consignor delivered the cabbages to the initial road in good order, the plaintiff would have shifted the burden on the defendant company of showing that it was not responsible for the damaged condition of the cabbage when delivered to the consignee. The only evidence offered by the plaintiff to show when the car which contained the cabbages was received by the defendant company from its connecting carrier was a letter from the agent of the defendant to plaintiff's attorneys. In that letter the agent wrote: "The car was delivered us at 9 a. m., and was forwarded south on the first train thereafter, arriving at Atlanta that afternoon." The car was turned over to the plaintiff without delay, upon its arrival, and the plaintiff commenced early the next morning to unload it. Marietta is 20 miles distant from Atlanta, and the average freight train makes about 20 miles per hour. So it affirmatively appears that the car was in the possession of the defendant company only a part of a day, and was forwarded to its destination by the first train leaving Marietta after the car was turned over to that company by its connecting line. As there was no delay in transportation or delivery to the consignee on the part of the defendant, the rot in the cabbages was attributable either to the delay

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of the carriers which handled the shipment before it was delivered to the defendant or to inherent natural causes. The plaintiff's proof indicates that the loss was occasioned by the failure of the connecting railroads to transport the car to Marietta in time for it to leave on an earlier train upon the defendant's line; for there was evidence that the cabbages were shipped on September 21st and ought to have arrived in Atlanta within three or four days. As the damage was not caused by the defendant's negligence, the grant of a nonsuit was proper.

Judgment affirmed. All the Justices concur.

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(Supreme Court of South Carolina, April 12, 1906.)

[54 S. E. Rep. 255.]

Carriers—Injury to Passenger—Evidence.—A witness, in an action for the death of a passenger, in describing the wreck, may state what injuries he received, and that another train ran into the wreck.

Evidence—Opinions of Witness.—In an action for the death of plaintiff's wife in a railroad accident, where both sides admit that intestate had been granted a pass over defendant's road, evidence by deceased's husband that he would not have to come to work for the defendant unless his wife had been furnished transportation was not improperly admitted as a matter of opinion.

Administrators—Action by—Right to Sue.—Where, in an action by an administrator, the records of the probate court granting administration have been admitted, it is not proper to ask the administrator on cross-examination, if he has been sworn in.

Evidence—Expert Testimony.—Where a train is wrecked on a trestle, an expert may describe the condition of the wreck, but cannot give his opinion as to the cause.

Appeal—Harmless Error.—In an action for death of a passenger, evidence of a witness that he was an employee and the railroad company had settled with him, though improper, was harmless error, where the railroad company only paid him his wages while disabled.

Carriers—Passenger Traveling on Pass.*—In an action for death of plaintiff's intestate, where the evidence showed that her husband agreed to go to a certain point to testify for a railroad company on condition that it furnish transportation for his wife, if the pass was issued for a consideration, the company is not relieved of liability for negligent killing of the wife by the stipulation on the pass to that effect.

Evidence—Parol Evidence.†—The fact that a pass over a railroad was granted for a valuable consideration may be shown by parol.

*For the authorities in this series on the question whether a carrier of passengers can limit its liability or exempt itself from liability, see foot-notes appended to *Yazoo, etc., R. Co. v. Grant* (Miss.), 18 R. R. R. 257, 41 Am. & Eng. R. Cas., N. S., 257; *Sprigg v. Rutland R. Co.* (Vt.), 17 R. R. R. 628, 40 Am. & Eng. R. Cas., N. S., 628; foot-notes appended to *Weaver v. Ann Arbor R. Co.* (Mich.), 16 R. R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603; foot-notes appended to *Northern Pac. R. Co. v. Adams* (U. S.), 10 R. R. R. 575, 33 Am. & Eng. R. Cas., N. S., 575 (validity of exemption clause in pass).

†For the authorities in this series on the subject of the admissibility of parol evidence to vary the contract purported to be expressed

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Damages—Personal Injuries.†—Evidence that a train was run over a trestle at 50 miles an hour when the schedule time was 33, and that an accident resulted, may support punitive damages in an action for wrongful death.

Appeal—Harmless Error.—An instruction on a matter not in issue is not ground for reversal, where the attention of the court was not called to it.

Carriers—Injury to Passenger.§—A railroad company, though not an insurer of the lives of its passengers, is liable for injuries to a passenger by unsound timber in a trestle or by any other defect therein.

Trial—Charge on Facts.—An instruction that, if a pass on which the person injured in a railway accident was carried was issued in pursuance of telegrams in evidence, it showed that the pass was issued without a valuable consideration, was properly refused as a charge on the facts.

Same—Urging Jury to Agree.—A jury, after considering a case for a night and a part of two days, were urged by the court to agree, it being important to reach a verdict because of the cost to the public and because some jury must sooner or later decide the case, and that, if the jury had agreed that plaintiff should have a verdict and only differed in amount they should harmonize their opinions, unless such opinions were based on conscientious convictions. Held not error.

Carriers—Injury to Passengers.||—Evidence that a railroad company furnished its road, ran its trains, and inspected its trestles in the manner which is generally believed to be safe and prudent should go to the jury with other evidence on the question of due care.

Appeal from Common Pleas Circuit Court of Abbeville County; Klugh, Judge.

by the terms of a passenger ticket, see foot-notes appended to Cincinnati, etc., Ry. Co. v. Harris (Tenn.), 19 R. R. R. 762, 42 Am. & Eng. R. Cas., N. S., 762.

†For the authorities in this series on the question when punitive or exemplary damages are, and are not, recoverable for wrongs to passengers, see foot-notes appended to Little Rock Traction & Elec. Co. v. Winn (Ark.), 19 R. R. R. 349, 42 Am. & Eng. R. Cas., N. S., 349; Ammons v. Southern Ry. Co. (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; Seaboard Air Line Ry. v. O'Quin (Ga.), 19 R. R. R. 103, 42 Am. & Eng. R. Cas., N. S., 103; foot-notes appended to Richardson v. Atlantic Coast Line R. R. (S. Car.), 18 R. R. R. 349, 41 Am. & Eng. R. Cas., N. S., 349.

§For the authorities in this series on the question whether the carrier is an insurer of the safety of its passengers, see foot-notes appended to Paul v. Salt Lake City R. Co. (Utah), 19 R. R. R. 45, 42 Am. & Eng. R. Cas., N. S., 45; foot-note appended to Louisville & N. R. Co. v. Board (Ky.), 19 R. R. R. 51, 42 Am. & Eng. R. Cas., N. S., 51; Bevard v. Lincoln Traction Co. (Neb.), 19 R. R. R. 79, 42 Am. & Eng. R. Cas., N. S., 79; Omaha St. Ry. Co. v. Boesen (Neb.), 19 R. R. R. 100, 42 Am. & Eng. R. Cas., N. S., 100; foot-notes appended to Maxfield v. Maine Cent. R. Co. (Me.), 19 R. R. R. 344, 42 Am. & Eng. R. Cas., N. S., 344; Hutcheis v. Cedar Rapids, etc., Ry. Co. (Iowa), 19 R. R. R. 362, 42 Am. & Eng. R. Cas., N. S., 362; foot-note appended to Conroy v. Boston Elev. Ry. Co. (Mass.), 19 R. R. R. 384, 42 Am. & Eng. R. Cas., N. S., 384; Philadelphia, etc., R. Co. v. Allen (Md.), 18 R. R. R. 581, 41 Am. & Eng. R. Cas., N. S., 581; foot-notes appended to Southern Ry. Co. v. Cunningham (Ga.), 18 R. R. R. 374, 41 Am. & Eng. R. Cas., N. S., 374.

||See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296; Norfolk & W. Ry. Co. v. Bell (Va.), 19 R. R. R. 263, 42 Am. & Eng. R. Cas., N. S., 263.

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Action by W. F. Nickles, administrator, against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the complaint:

"The plaintiff above named, by his attorney, Wm. N. Graydon, complaining of the above-named defendant, alleges:

"(1) That the plaintiff is a resident and citizen of this county and state.

"(2) That the defendant is a corporation duly chartered under the laws of the state of South Carolina, and is now, and was at the time hereinafter mentioned, engaged in business as a common carrier of freight and passengers, and was and is operating the Georgia, Carolina & Northern Railroad, running from Monroe, North Carolina, through the state of South Carolina, by way of Catawba, Chester, Clinton, Greenwood, and Abbeville, and to Atlanta, by way of Elberton, Athens, and Winder.

"(3) That on the 9th day of September, 1904, the plaintiff's intestate, Rhoda B. Black, was a passenger on one of defendant's regular passenger trains, and was on her way to Elberton, in the state of Georgia.

"(4) That while the train on which plaintiff was a passenger was crossing a high trestle on said road, in the county of York, in this state, and near a station on said road called Catawba, she was killed by the gross carelessness and negligence of said defendant; said trestle giving way and precipitating said train down an embankment, instantly killing said Rhoda B. Black by breaking her neck and inflicting other and fatal injuries upon her.

"(5) That said defendant was grossly negligent and careless in running said train over said trestle at a dangerous and unusual rate of speed, in the nighttime, and was further grossly negligent, reckless, and careless, in that said trestle was dangerous and unsafe, some of the timbers thereof being rotten and unsound, a great many bolts on said trestle not having any nuts or taps on them, and the same being negligently and carelessly built, and not of sufficient strength to stand the strain of a heavy engine and train of cars, such as was then being used, and in the manner that said train was being run, by which gross negligence, recklessness, and carelessness, and careless and negligent conduct, said Rhoda B. Black was then and there instantly killed.

"(6) That the direct cause of the death of the said Rhoda B. Black was the negligent, careless, and improper manner in which said train was being run, and the grossly careless, reckless, and unsafe way in which said trestle was allowed to be by said defendant.

"(7) That the said Rhoda B. Black left surviving her, her husband, T. F. Black, and her father, Joseph Bunk, her mother, Mrs. Joseph Bunk, and her sister, Annie Frazier, but left no children, having been married only four or five months, the above-named parties being her only heirs at law and distributees.

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“(8) That the said Rhoda B. Black died intestate, in the county of York, in this state, and thereafter, on the 7th day of October, 1904, letters of administration upon the personal estate, goods, rights, and credits, which were of the said Rhoda B. Black, was duly issued and granted to this plaintiff by the probate court of York county, South Carolina, and this plaintiff duly qualified as such administrator and entered upon the discharge of the duties of said office, and is still acting as such administrator.

“(9) That this action is brought for the use and benefit of T. F. Black, the husband of the said Rhoda B. Black, in accordance with the terms of the statutes in such case made and provided.

“(10) That by the carelessness, negligence, and grossly negligent, reckless, and careless conduct of the defendant in failing to carry safely the said Rhoda B. Black, and its careless, negligent, reckless, and gross failure to do its duty in the premises, the said T. F. Black, the husband of the said Rhoda B. Black, has been damaged by the death of his said wife, in the sum of \$50,000.

“Wherefore, the plaintiff demands judgment against the defendant for the sum of \$50,000, to be paid to him as administrator as aforesaid for the use and benefit of the said husband of the said Rhoda B. Black, deceased, and for the costs and disbursements of this action.”

Within the time allowed by law, the defendant served its answer, of which the following is a copy:

“The defendant above named, answering the complaint herein, says:

“(1) That it has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 7, 8, and 9 of the said complaint.

“(2) In answer to the allegations contained in paragraph 2 of the complaint, the defendant admits that it is a corporation duly chartered and is now, and was at the times hereinafter mentioned, engaged in business as a common carrier of freight and passengers, and was and is operating the Georgia, Carolina & Northern Railroad, running from Monroe, North Carolina, through the state of South Carolina, by way of Catawba, Chester, Clinton, Greenwood, and Abbeville, and to Atlanta, by way of Elberton, Athens, and Winder.

“(3) That the defendant admits that the said Rhoda B. Black was riding on one of defendant's passenger trains on the 9th of September, 1904, but specifically denies that the said Rhoda B. Black was riding on said passenger train as a passenger for hire.

“(4) That the defendant denies the allegations contained in paragraphs 4, 5, 6, and 10.

“Further answering said complaint, and for a defense thereto, this defendant alleges:

“That at the time the said Rhoda B. Black came to her death,

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she was riding upon what is commonly known as a free pass or ticket, and had not paid, or promised to pay to this defendant, any sum of money whatsoever, or any other valuable consideration for her transportation upon said train, but was being transported entirely free of charge by the defendant. That the said Rhoda B. Black had agreed with the defendant, in consideration of her being carried and transported free of charge, that the defendant should not, under any circumstances, be liable to her for any injury or damage received by her while she was being so transported. That this defendant pleads the benefit of this contract, between the said Rhoda B. Black and the defendant, by which she was being transported free of charge at the time she met her death, and by which the defendant should not be liable for any injury or damage received by her while being so transported.

"Wherefore, the defendant demands judgment that the complaint herein be dismissed, with costs."

From judgment for plaintiff, defendant appeals upon the following exceptions:

"(1) Because his honor erred in allowing testimony in this action as to injuries received by T. F. Black, the husband of plaintiff's intestate; such testimony being irrelevant and immaterial to the issues involved herein, and prejudicial to the defendant.

"(2) Because his honor erred in allowing witness T. F. Black, over the objection of the defendant, to testify to the fact that another train of cars ran into and upon the wreck of the train upon which plaintiff's intestate was traveling; it not being alleged in the complaint, nor claimed in the testimony, that such second train contributed in any manner to the injuries received by plaintiff's intestate. Such testimony was, therefore, irrelevant to the issues involved in this litigation, and the same was prejudicial to the defendant.

"(3) Because his honor erred in allowing the witness Black, over the objection of the defendant, to testify that he would not have left Ohio, and would not have gone to Elberton, Ga., to testify in the case for the defendant, unless the defendant had agreed to give to him transportation for his wife in order that she might accompany him. It is submitted that such testimony was incompetent for the reason that the contract by which he went to Elberton, Ga., was contained in the written telegrams, and was further incompetent for the reason that it contradicted the written evidence of the contract, and was a matter of opinion and speculative, and not as to the facts of the case.

"(4) Because his honor erred in refusing to allow the defendant to ask the witness Nickles, on cross-examination, whether he had taken the oath of office as administrator as required by law, and erred in refusing to allow the witness to answer such question. It is submitted that the plaintiff having alleged that Nickles had qualified as administrator and the same having been specifically denied, it was competent for the defendant to show

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that he had never qualified as such administrator, as required by law. It is submitted that his honor erred in holding that such testimony would contradict the record of the probate court of York county, when he should have held that there was nothing in the record showing that the said Nickles had ever qualified as such administrator except a certificate of the judge of probate, which was no part of the record, and which was not binding on the defendant.

“(5) Because his honor erred in refusing to allow the witness Hamrick to give in evidence his opinion as to what caused the wreck of the train on which plaintiff's intestate was an alleged passenger, and erred in holding and ruling as follows: ‘He could do that, if this jury were charged with the duty of determining what did cause the wreck. They are not charged with that; then it is for them to say whether the matters included within the issue, as submitted to them, caused the wreck. For the witness to go off into other speculations about the cause would not only not be relevant, but might be misleading to the jury.’ (a) It is submitted that after the witness visited the scene of the wreck, immediately after it happened, and after having examined the piles, timbers, and all parts of the trestle, and after having observed the conditions and surroundings, taken in connection with the facts that he had superintended the construction and periodically examined all parts of the trestle, to all of which facts he had testified before the jury, it was competent for him to give an opinion as to the cause of the wreck, to the benefit of which opinion the defendant was entitled, and it is further submitted that such testimony was relevant, for the reason that the defendant was entitled to show, as rebutting the allegations of negligence, gross negligence, and recklessness, that the wreck occurred from causes other than these, and from causes beyond the control of the defendant. (b) It is further submitted that the testimony showed that the witness was the superintendent of the defendant in the building of its trestle, and in keeping the same in repair, and that it further showed that he had a peculiar knowledge as to such matters, and therefore showed that he was an expert, and having visited the scene of the wreck, immediately after it occurred, and having examined the piles, timbers, and all parts of the trestle, and having observed the conditions and surroundings, and taken in connection with the facts that he had superintended the construction and periodically examined all parts of the trestle, having testified to all these facts before the jury, it was competent for him to give an opinion as to the cause of the wreck, to the benefit of which opinion the defendant was entitled, and it is further submitted that such testimony was relevant, for the reason that the defendant was entitled to show, as rebutting the allegations of negligence, gross negligence, and recklessness, that the wreck occurred from causes other than these, and from causes beyond the control of the defendant, and his honor erred in not so holding and ruling.

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“(6) Because his honor erred in not allowing the witness Hamrick to testify that in his opinion the wreck was not caused by a lack of bolts, or lack of nuts or taps in the trestle. (a) It is submitted that after the witness had visited the scene of the wreck, immediately after it happened, and after having examined the piles, timbers, and all parts of the trestle, and after having observed the conditions and surroundings, taken in connection with the facts that he had superintended the construction and periodically examined all parts of the trestle, to all of which facts he had testified, it was competent for him to give an opinion as to the cause of the wreck, to the benefit of which opinion the defendant was entitled, and it is further submitted that such testimony was relevant, for the reason that the defendant was entitled to show, as rebutting the allegations of negligence, gross negligence, and recklessness, that the wreck occurred from causes other than these, and from causes beyond the control of the defendant. (b) It is further submitted that the testimony showed that the witness was the superintendent of the defendant in the building of its trestles, and in keeping the same in repair, and that it further showed that he had a peculiar knowledge as to such matters, and therefore showed that he was an expert, and having visited the scene of the wreck, immediately after it occurred, and having examined the piles, timbers, and all parts of the trestle, and having observed the conditions and surroundings, and taken in connection with the facts that he had superintended the construction and periodically examined all parts of this trestle, to all of which he had testified, it was competent for him to give an opinion as to the cause of the wreck, to the benefit of which opinion the defendant was entitled, and it is further submitted that such testimony was relevant, for the reason that the defendant was entitled to show, as rebutting the allegations of negligence, gross negligence, and recklessness, that the wreck occurred from causes other than these, and from causes beyond the control of the defendant, and his honor erred in not so holding and ruling.

“(7) Because his honor erred in not striking out the following question and answer of the witness Hamrick, brought out on cross-examination: ‘Q. Was there any watchman employed there to look after this trestle? A. No, sir.’ The said question and answer were not relevant to any allegation in the pleadings, and were not involved, necessarily or incidentally, in any issue raised thereby. Such testimony was therefore irrelevant, and was prejudicial to the defendant, in allowing the plaintiff to prove alleged acts of negligence, of which defendant had not been advised, and to which it was not prepared to reply.

“(8) Because his honor erred in refusing to allow witness J. L. Davidson to give his opinion as to whether the wreck in this case was caused by rotten timber or defective construction of the trestle, and erred in holding and ruling as follows: ‘The general rule is, then, that such opinions are competent in those cases where, after a personal observation, a description without

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an opinion would convey an imperfect idea. It seems to me the ruling this morning, in view of that general principle, is wrong. The witness may testify to a condition of things prevailing, and it seems to me that the description of what the witness saw from his personal observation sufficiently enables the jury to form an opinion without the necessity of the witness expressing an opinion himself, so that I will reverse the ruling made this morning.' (a) It is submitted that the witness, having visited the scene of the wreck, immediately after it occurred, examined the piles, timbers, and all parts of the trestle, and after having observed the conditions and surroundings, having testified to all these matters, was entitled to give in evidence his opinion as to whether the wreck was caused by rotten timbers or defective construction of the trestle, to which opinion the defendant was entitled in this case. (b) It is further submitted that the testimony shows that witness was an expert in such matters, being general superintendent of another railroad company, having had many years of experience in railroad work, and after having visited the scene of the wreck, and examined the piles, timbers, and all parts of the trestle, and after having observed the conditions and surroundings, and after having testified to the facts before the jury, it was competent for him to give his opinion as to whether or not the wreck in this case was caused by rotten timbers or defective construction of the trestle.

"(9) Because his honor erred in striking out of the testimony so much of the testimony of the witness Hamrick as contained his opinion as to whether the wreck of the train on which plaintiff's intestate was riding was caused by rotten timbers or defective construction of the trestle, and erred in holding and ruling as follows: 'I will have that stricken out, and will instruct the jury now that while you will take every fact testified to as to the condition of things, when a witness says in his opinion the catastrophe was not caused so and so, that opinion is not evidence for you to consider. You take the facts as he describes them and determine for yourselves from these facts not only whether the accident or catastrophe could have been produced by the alleged cause, but whether, as a matter of fact, it was produced by the alleged cause.' (a) It is submitted that after the witness had visited the scene of the wreck, immediately after it happened, and after having examined the timbers, piles, and all parts of the trestle, and after having observed the conditions and surroundings, taken in connection with the facts that he had superintended the construction and periodically examined all parts of the trestle, having testified to all the facts, it was competent for him to give an opinion as to the cause of the wreck, to the benefit of which opinion the defendant was entitled, and it is further submitted that such testimony was relevant, for the reason that the defendant was entitled to show, as rebutting the allegations of negligence, gross negligence, and recklessness, that the wreck occurred from causes other than these, and from causes beyond the control of the defendant.

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It is further submitted that the testimony showed that the witness was the superintendent of the defendant in the building of its trestles, and in keeping the same in repair, and that it further showed that he had a peculiar knowledge as to such matters, and therefore showed that he was an expert, and having visited the scene of the wreck immediately after it occurred, and having examined the piles, timbers, and all parts of the trestle, and having observed the conditions and surroundings, taken in connection with the facts that he had superintended the construction and periodically examined all parts of this trestle, having testified to all the facts, it was competent for him to give an opinion as to the cause of the wreck, to the benefit of which opinion the defendant was entitled, and it is further submitted that such testimony was relevant, for the reason that the defendant was entitled to show, as rebutting the allegations of negligence, gross negligence, and recklessness, that the wreck occurred from causes other than these, and from causes beyond the control of the defendant, and his honor erred in not so holding and ruling.

“(10) Because his honor erred in allowing plaintiff's counsel to ask the witness Davis, on cross-examination, whether he had been settled with for injuries received in this wreck, and erred in allowing said witness to answer said question, over the objection of the defendant, and erred in not striking out such testimony on the motion of the defendant, when it is submitted that such testimony was irrelevant and incompetent for the reason that a party may buy his peace, or compromise claims against him, without admitting his liability, and such facts cannot be used as evidence, either between parties or between one of them and other parties.

“(11) Because his honor erred in allowing the witness T. F. Black, over the objection of the defendant, to testify, in reply, that the witness Davis did not say anything to indicate whether he had sent a message concerning the wreck to an agent of the defendant or not. It is submitted that such testimony was not in reply to any testimony offered by the defendant, and the witness Davis not having been asked with regard to such alleged conversation, it was incompetent to contradict him in this manner, and the testimony was pure hearsay.

“(12) Because his honor erred in charging and instructing the jury that a railroad company cannot make a valid binding contract with a free or gratuitous passenger to relieve itself from more than ordinary negligence, and cannot make such contract to relieve itself from injuries received by such passenger on account of gross negligence; whereas, it is submitted that a railroad company may make a valid contract with such passenger which will relieve it of liability on account of all injuries resulting from negligence, or gross negligence, and all other acts except such as are willful or wanton in their nature.

“(13) Because his honor erred in charging the jury that it was incumbent upon the defendant to satisfy the jury by the preponderance of the evidence that Mrs. Black, plaintiff's in-

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testate, was riding on a free pass; whereas, he should have charged the jury that if plaintiff sought to hold the defendant liable for mere ordinary negligence, it was incumbent on him to prove by the preponderance of the evidence that his intestate was a passenger for hire, otherwise, under the law of this state, the defendant would have been liable only for acts of gross negligence, or willful or wanton acts resulting in injury.

“(14) Because his honor erred in charging the jury as follows: ‘Then, if you find the railroad company not only caused her death by negligence and became liable, but that it caused her death by its recklessness, then you may award, in addition to damages by way of compensation, also damages by way of punishment, to make an example of the railroad company—punitive damages or exemplary damages, as they are sometimes called. A railroad company is liable for punitive or exemplary damages where it is guilty of willful or wanton or malicious or reckless conduct. In this case there is no question of wantonness or willfulness or maliciousness involved, but the allegation of recklessness it made, and if you find that the railroad company caused the death of Mrs. Rhoda B. Black by its recklessness, in the manner specified in the complaint, then the railroad company may be held liable not only for actual damages, but such damages in addition to that as, by way of punishment, may deter this railroad company from similar acts of recklessness hereafter, and may also by way of example, of this railroad company, deter other railroads from similar recklessness.’

(a) The error consists in this: Punitive damages can be awarded to a plaintiff only in vindication of the private right which has been willfully, wantonly, or recklessly invaded, and in such an amount as will compensate or satisfy the plaintiff for the willfulness or wantonness or recklessness with which his private rights are invaded, and in addition thereto operate to deter the wrongdoer and as a warning to others, but such damages can never be awarded in a civil action to a litigant as a fine or penalty, or as a punishment for a public wrong. (b) Punitive damages cannot be awarded against a wrongdoer in such an amount as to deter other wrongdoers, or other defendants, from committing like acts, but only in such an amount as will deter the wrongdoer, and as will operate as a warning to others. It is submitted that a much less amount than would deter other railroads might operate as a deterring punishment to the wrongdoer in this case, and as a warning to others. The charge was therefore erroneous and prejudicial to the defendant, in that the jury were thus instructed to award punitive damages in a greater amount than they might otherwise have considered sufficient under the law, had it been properly given to them. (c) Plaintiff's cause of action being for the wrongful death of another, his cause of action is statutory, and he can have no greater remedy, and no greater measure of relief, than that given by the statute on which he bases his action, and it is submitted, under the statute in this state allowing actions on account of the

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wrongful homicide of another, damages, including exemplary or punitive damages, can be awarded to plaintiff only in such an amount as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. (1) Therefore, in an action under Lord Campbell's act in this state, punitive damages can be awarded, in a proper case, only so far as such damages are in vindication of the rights of the party for whose benefit the action is brought—for the malicious, willful, wanton or reckless invasion of such rights. (2) But such damages can never be awarded under such statute as a punishment to the wrongdoer for his wrong. (3) Nor can such damages be awarded under the statute in an amount sufficient to deter others.

“(15) Because his honor erred in submitting to the jury the question as to whether plaintiff was entitled to punitive damages, when there was absolutely no testimony tending to prove any reckless acts on the part of the defendant.

“(16) Because his honor erred in refusing to charge the jury, at the request of the defendant, that plaintiff could not contradict the terms of the agreement on the part of Mrs. Rhoda B. Black, indorsed on the pass or ticket on which she was riding. It is submitted that the same, having been signed and accepted by her, and the agreement indorsed thereon stating the consideration for the same, it was not competent for plaintiff to dispute the terms thereof, nor to show a different consideration for the said pass or ticket, in the absence of allegations of fraud or mistake.

“(17) Because his honor erred in refusing to charge the eleventh request of the defendant, which was as follows: ‘That if the jury finds in this case that the pass upon which plaintiff's intestate was riding was issued pursuant to the telegrams offered in evidence by the plaintiff, and that such telegrams were sent and delivered in the order named by T. F. Black, then the telegrams failed to show that the said pass was issued upon any pecuniary or other valuable consideration moving to the defendant.’ It is submitted that it was for the court to construe the telegrams in this case, the same being written instructions; and it is further submitted that if they be taken as sent in the order as stated by T. F. Black, they fail to show that the pass issued to Mrs. Rhoda B. Black was sent pursuant to a contract, but, on the other hand, show that the pass was sent to Mrs. Rhoda B. Black as a gratuity. His honor should have charged this request, and erred in holding that it involved a charge on the facts.

“(18) Because his honor erred in refusing to charge the twelfth request of the defendant, which is as follows: ‘If railway companies exercise their functions in the same way with prudent railway companies generally, and furnish their road and run their trains in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them, and if the jury in this case find that the de-

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fendant constructed, maintained, and inspected its trestle in the manner generally found and believed by prudent railways to be safe, and that it was operating its train in the customary manner which is generally found and believed by prudent railway companies to be safe, then the jury must find for the defendant.' It is submitted that such charge embodies a sound proposition of law, and his honor erred in refusing to charge it.

"(19) Because his honor erred in charging the plaintiff's seventh request to charge, which is as follows: 'That if the jury find from the testimony that the timbers, or any of them, out of which such trestle was built were unsound or rotten, and that such wreck was caused by reason of said unsound or rotten timbers being in said trestle, then the jury must find a verdict for the plaintiff.' It is submitted that such a charge was erroneous, for the reason that it made the defendant an insurer against all accidents caused by defects, whether the same could have been known by the defendant by the use of the highest degree of care compatible with its business or not, and therefore made the defendant an insurer against latent defects of which it had no knowledge, and of which it could not have known by the use of that degree of care required of it under the circumstances.

"(20) Because his honor erred in charging the sixth request of the plaintiff, which is as follows: 'That it is the duty of the defendant to keep its road, its roadbed, and trestle in a safe and sound condition for the passage of its train of cars, and if the jury find from the testimony that the trestle was not sound and well built, and not of sufficient strength to stand the strain of an engine and cars such as was being used on that occasion, and should further find that the defective trestle caused said wreck which resulted in the death of Rhoda B. Black, then the jury must find a verdict in favor of the plaintiff.' The error consists in this: That in so charging his honor made the railroad company an absolute insurer of the safety of its roadbed, track, and trestle; whereas, it is only incumbent on railroad companies, with reference to the carriage of passengers, to use the highest degree of practical care in the construction and maintenance of their roadbed, track, and trestle, and in the running and management of their trains on the same. It is further submitted that the charge of his honor made the defendant an insurer against latent defects in its roadbed, track, and trestle, whether the same could have been discovered by it by the use of the highest degree of practical care in the construction and maintenance of its roadbed, track, and trestle, or not; whereas, defendant was not responsible for such defects.

"(21) Because his honor erred in charging the eighth request of the plaintiff, which is as follows: 'The law, in tenderness to human life and limb, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proof every imputation of such negligence. When common carriers undertake to convey passengers by the powerful but

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dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case, which causes the injury or death of a passenger, will make such carrier liable.' The error consists in this: That the charge of his honor to the jury cast the burden of proof upon the defendant to satisfy the jury that it had not been negligent whenever, and in such particulars as, the plaintiff charged that it had been negligent. The purport of the charge was that all that was necessary on the part of the plaintiff was to charge or impute negligence to the defendant, and it then became the duty of the defendant by satisfactory proof to repel such charge; whereas, the correct rule is that the plaintiff should have been required to establish the acts of negligence alleged in his complaint by the preponderance of the testimony, and all that the defendant was required to do in rebutting such allegations was to equally balance the weight of plaintiff's testimony as to such points. It is further submitted that, in any event, the defendant was not required to repel by satisfactory proof any charge of negligence until some testimony had been offered going to prove such act of negligence, and that the charge was in this respect erroneous.

"(22) Because his honor erred in his second charge to the jury, when they had been recalled by him after having had the case under consideration for a night and a part of two days, and having reported that they could not agree, in impressing upon the jury the importance of agreeing upon a verdict, and suggesting as reasons to them why they should do so: (a) The time that had been consumed in the hearing and argument of the case, five days practically. (b) The great expense of labor and money to the litigants. (c) The great expense to the public, and in the same connection reminding the jury of the fact that it took public money to run the court. It is respectfully submitted that these were improper reasons or inducements suggested to the jury why they should agree upon a verdict, and such reasons and inducements had a tendency to make them agree upon a verdict whether it met with their approval or not, and had a tendency to cause them to agree upon a verdict simply to end the case, whether the same, in their view, was in strict accordance with the law and evidence or not. Because it was error on the part of the circuit judge to make any other charge or remarks to the jury in reference to the case when they had repeatedly informed the court that they could not agree, and when they had reported to the court, in response to questions by the trial judge, that they did not desire any further instructions as to the law, and they did not wish any of the testimony read to them. It is submitted that, in view of these facts, the jury were improperly coerced into finding a verdict in this case as shown by the record. It is further submitted that the province of the trial judge in the trial of a law case under the Constitution of this state is simply to declare the law of this case, and that a trial judge has no right to charge, but

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is forbidden from charging, the jury with respect to matters of fact, or with respect to matters which might induce the jury to render a verdict where otherwise they would not have done so. The charge of his honor, therefore, as stated above, was contrary to the provisions of the Constitution, in that his honor charged the jury with respect to matters other than the strict law of the case.

“(23) Because his honor erred in suggesting to the jury that if they agreed that the plaintiff should recover, but differed as to the amount he should recover, then their labors ought to come to an early conclusion, thereby suggesting to the jury that in fixing the amount of the verdict they were not bound by the same rules that they would be in arriving at a conclusion as to whether or not the verdict should be for the plaintiff or defendant; whereas, his honor should have charged the jury that it was none the less their duty to fix the amount of the verdict according to the law and evidence, than to determine from the law and evidence as to whether the verdict should be for the plaintiff or defendant. It is further submitted that the charge of his honor in this regard suggested to the jury the propriety of rendering a quotient verdict, and that his charge was in this respect erroneous. It is submitted further that, under the Constitution and laws of this state in a case of this kind, his honor is forbidden to charge the jury with respect to any matter except the law of the case, and therefore any suggestions from the court to the jury as an inducement to them to arrive at a verdict were erroneous.

“(24) Because his honor erred in further suggesting to the jury that if they were all of the opinion that a verdict ought to be rendered on one side or the other, they ought to arrive at some common ground and bring that in as their verdict, and erred in reiterating and impressing upon the jury the great importance of their arrival at a verdict in the case, giving such suggestion more prominence in his second charge to the jury than the importance of arriving at a proper verdict. It is submitted that his honor thereby suggested to the jury that it would be proper for them to compromise their differences, and to bring a quotient verdict; whereas, he should have charged the jury that in arriving at the amount of their verdict they should be guided by the strict rules of law and evidence as much so as in arriving at the conclusion as to whether the verdict should be for the plaintiff or the defendant, and should charge the jury that in determining the amount of their verdict they should be governed by the same conscientious motives by which they were governed in determining as to whether the verdict should be for the plaintiff or for the defendant.

“(25) Because his honor erred in reiterating to the jury, in his second charge to them, the importance of agreeing upon a verdict because of the great expense to the litigants and public in trying the case, and in suggesting to them the propriety and practicability and necessity of their agreeing upon a com-

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promise verdict and harmonizing their views, and in reminding the jury of the possibility of the court to keep them in consideration of the case for a long time. It is submitted that after the jury had been charged with the case for a night and a part of two days, and had repeatedly reported to the sheriff their inability to agree, and after they had informed the court, in response to questions, that they did not desire to be charged further as to the law or to have the testimony read to them, it was improper to send them back to the jury room to further consider the said case with the suggestions above set forth; such charge and proceeding on the part of the court amounting to an improper coercion of the jury in reaching a verdict. It is further submitted that the jury should have rendered their verdict, if at all, according to the strict law and evidence of the case, and in endeavoring to arrive at a proper verdict it was improper for them to consider the expense to the litigants or to the public in the trial of the case, and his honor erred in suggesting these matters to the jury as an inducement to them to agree. It is further submitted that, under the Constitution and laws of this state, a trial judge is forbidden from charging the jury with respect to any matters except the strict law of the case, and that therefore, when his honor made the above suggestions to the jury as an inducement to them to arrive at a verdict, he improperly invaded the province of the jury and committed error.

“(26) Because his honor erred in excluding the testimony of witness J. R. Hamrick, and erred in striking out his testimony, giving his opinion as to whether or not the wreck of the train was caused from rotten or unsound timber, or from improper construction of the trestle. The defendant was entitled to have this opinion given, because the testimony showed that the witness had ordered the timbers for the construction of the trestle, inspected them, planned the trestle, and had general oversight of its construction, and had given it close examination on an average of about once a month from the time it was constructed to the date of the accident; had visited the scene of the accident a few hours after it happened, had examined the broken part of the trestle closely, with a view to ascertaining the cause of the wreck, a short time after it occurred, had supervised the removal of the debris, and reconstructed the portion of the trestle which had been injured; and the witness had also related to the jury all the particulars of his knowledge of the trestle above before and after the accident. It was therefore competent for him, after testifying to all of these facts, to give his opinion as to whether or not the wreck of the train was caused from defective construction or rotten timbers in the trestle, even if he were not an expert. It was also competent for this witness Hamrick to give his opinion because he was an expert. His testimony showed that he had been in the railroad business, having special charge of the bridges and trestles, for many years; in fact, that had been his life work; he necessarily having

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constructed and supervised the construction of many trestles, and having rebuilt and repaired many bridges, and being continually in the business of constructing and supervising and repairing trestles and bridges. It is submitted that it was competent for the witness to testify what in his opinion caused the wreck, and it was competent for him, under the circumstances, after having testified to all of the facts, to state whether or not in his opinion the wreck was caused from improper construction of the trestle, or from rotten timbers in the trestle. It is competent for him to give his opinion as to whether the wreck of the train was caused by some certain causes and to exclude some one supposed cause."

J. S. Glenn and W. P. Greene, for appellant.

Wm. N. Graydon, for respondent.

POPE, C. J. This is an action brought in the court of common pleas of Abbeville, by the plaintiff, Nickles, as the administrator of the estate of Rhoda B. Black, deceased, for the uses and benefit of T. F. Black, the husband of the said Rhoda B. Black, in accordance with the statute of this state, for damages amounting to \$50,000. The complaint sets forth all facts and circumstances of the death of Mrs. Black. The answer of the defendant denied its liability. The report should set forth the case, the complaint, and the amended answer, omitting plaintiff's demurrer to a part of the answer; it having been overruled by the circuit judge, and no appeal being taken therefrom. The case came on to be tried by his honor, Judge Klugh, and a jury. The verdict for the plaintiff was for \$8,000. After judgment thereon, the defendant appealed upon 26 grounds, which should be set forth in the report of this case.

The exceptions will be classed as follows: I, 1, 2; II, 3; III, 4; IV, 5, 6, 7, 8, 9, 26; V, 10; VI, 11; VII, 12; VIII, 13; IX, 21; X, 19, 20; XI, 16; XII, 17; XIII, 14, 15; XIV, 22, 23, 24, 25; X, 18. Before proceeding with the examination of these exceptions the history of the case in general terms may be stated as follows: Thomas F. Black was a telegraph operator stationed at Haverhill, Ohio. His wife, the intestate, Rhoda B. Black, resided with her husband, said T. F. Black, at Haverhill, Ohio, having been married but a few months. The defendant railway was anxious to secure his testimony in its behalf in a lawsuit pending trial at Elberton, Ga. A communication was opened by the defendant with said T. F. Black by telegraph, and an agreement was reached by said Black with said defendant railway by which the said Black agreed to give his testimony at Elberton, provided some one should take his place, temporarily, as telegraph operator; that he should be paid for his services as telegraph operator while attending court; that a ticket should be furnished to himself and wife to Elberton, Ga., from Haverhill, Ohio. That on the 9th day of September, 1904, Black and wife were proceeding on their trip to Elberton when, on the night of the said 9th of September, while as passengers on the

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defendant railway, while crossing a trestle at a high rate of speed—about 50 miles an hour, while 33 miles an hour was the schedule speed—the entire train, consisting of the engine, tender, mail car, express car, the first and second passenger coaches, and the Pullman car, were precipitated from the trestle, 30 feet high, to the ground. The trestle at the southern end gave way. The plaintiff claims that the trestle gave way because improperly constructed; the timber thereof being rotten, and the bolts insecurely fastened, having no taps, etc., while the defendant claims that said trestle was constructed in a thorough manner and that the said train was thrown from the track on said trestle because of the placing of a bar of iron, by an unknown person, on said trestle, thus causing the engine to be forced from the track—the damage ensuing therefrom. The defendant denies that the timbers were rotten, or that there was any error of construction of the Whisonant trestle. Both sides admit that Mrs. Rhoda Black was killed in the wreck; her neck being broken. A great deal of testimony was taken on each side as to the condition of the piling upon which the trestle was constructed. We will now consider the exceptions in groups.

I. These exceptions relate to an alleged error of the circuit judge in permitting the witness T. F. Black to state the injuries received by him in the wreck, on the ground that such testimony was irrelevant and immaterial to the issues involved herein as prejudicial to the defendant. We cannot see that this testimony was anything but descriptive of the wreck. Defendant's witnesses admitted that four persons were killed in the wreck. This witness was merely explaining the condition in which he groped about the car to find his wife's dead body; there being no lights, the same having been extinguished by the fall of the coach over the embankment. We see no possible objection to this testimony, and so as to the second exception, which relates to the objection to Black's testimony, wherein he said a second train of cars ran into and upon the wreck of the train upon which the plaintiff's intestate was traveling. The witness having testified that his wife's neck was broken before this second train ran into them, the objected testimony had some relevancy by showing what effect this second train had upon the trestle in question. This exception is overruled.

II. This exception sets up an alleged error of the circuit judge in allowing the witness Black to testify that he would not have left Ohio unless the defendant railway should have extended its ticket to his wife, the intestate. Both sides admit that the intestate was granted transportation from Ohio to Elberton, Ga., over defendant's road. Both sides also admit that there was quite an animated colloquy, by telegraph, between these parties. The witness Black had refused to come as a witness unless certain conditions were complied with. He apprised the railroad of his unwillingness to leave his young wife alone in Ohio in case he came to Elberton, Ga., and it seems, therefore, that it was not at all illegal for the witness to state that he would not have come

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for the defendant unless his wife was furnished transportation by the defendant. This exception is therefore overruled.

III. This exception imputes error to the circuit judge in refusing to allow the defendant to ask Nickles, the plaintiff, on cross-examination, whether he had taken the oath of office as administrator, as required by law. The plaintiff had alleged in his complaint that he had been appointed administrator of the estate, and the defendant in its answer had virtually denied the same. When it became necessary to establish the representative character of the plaintiff, without objection the plaintiff introduced the entire record of the probate court of York county from the petition for letters of administration through every step down to and including letters of administration granted by said probate court of York county, which record was certified to under the hand and seal of the probate judge of York county. Thus the record of such probate court was introduced without objection. Therefore, it is not in the power of the defendant, by its collateral attack upon such record, to nullify the same. The probate court, while a court of limited jurisdiction, is a court of record and not an inferior court as to matters clearly within its jurisdiction. *Ex parte White*, 38 S. C. 41, 16 S. E. 286, where the foregoing is announced, and it is also held that its grant of administration may be vacated only by direct proceeding. *Hankinson v. Railway Co.*, 41 S. C. 1, 19 S. E. 206, in which Chief Justice McIver held that section 2182 of the General Statutes of 1882 of this state, providing that a certified copy of the letters of administration shall be sufficient evidence of appointment of such executor or administrator in any court of this state, but that statute only supersedes a necessity of introducing the whole record of the court of probate. But in this instance the whole record has been introduced, and as long as that record stands unimpeached directly, it is improper to assail any portion in a collateral manner. This exception must be overruled.

IV. These exceptions are intended to bring in question the ruling of the circuit judge in excluding the opinions of witnesses Haverick and Davidson as to what caused the wreck in which Mrs. Black was killed. These two witnesses whose opinions were sought had both testified as to all the facts which came within their knowledge, but neither one of them was an eye-witness to the occurrence. Neither one was present when the catastrophe occurred. So, if their opinion as to the cause of the same could be given, it could only be given as experts. It has been held in this state that an opinion may be given by a witness as to time, distance, velocity, form, size, age, strength, heat, cold, etc. *Ward v. Charleston R. R. Co.*, 19 S. C. 521, 45 Am. Rep. 794. So, also, as to injury to the sensibility of a woman who has had her affections trifled with. *Jones v. Fuller*, 19 S. C. 70, 45 Am. Rep. 761. "The general rule is that a witness is not at liberty to express an opinion, but must confine himself to the statement of facts." *Jones v. Fuller*, *supra*. "The law

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does not look with favor upon the introduction of opinions in evidence. As a rule, witnesses are expected to testify to facts, and it is for the court or jury to draw conclusions and form opinions upon the facts thus brought before them. Even when opinions are admitted, the ostensible purpose is to inform the jurors concerning some fact, and evidence which is sometimes received from necessity has been said to be less an opinion than a conclusion of fact." 12 A. & E. Encyclopedia of Law (2d Ed.) 421. In discussing expert evidence, the same author, at page 422, says: "The general rule as to the admission of expert evidence is that persons having technical and peculiar knowledge on certain subjects are allowed to give their opinions when the question involved is such that the jurors are incompetent to draw their own conclusions from the facts without the aid of such evidence." State v. Clark, 15 S. C. 403. Mr. Greenleaf, in his work on Evidence, says, in volume 1, § 440: "That in questions of science, skill, or trade, or others of like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. Thus the opinions of medical men are constantly admitted as to cause of death, of disease, or the consequence of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other objects of professional skill; and such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself as proved by other witnesses." Now, in the case at bar, the witnesses named were each asked to give his opinion as to the cause of the accident. There was testimony on the part of the plaintiff that there was a high rate of speed in running the train; that some of the piles of the trestle had rotted and gave way, thus precipitating the train to the earth, a distance of 30 feet. There was testimony of the defendant that the trestle was built of the best timber, and there was some testimony that might lead to the conclusions that the roadbed had been tampered with which threw the engine off the track at the south end of the trestle. Therefore, no matter what caused the injury, all these facts were fully testified to by witnesses. No reason existed why these experts should be called in to aid the jury. It became a question of hard common sense.

The question of the ruling of the circuit judge on the right of the witness Haverick to state his opinion as to the cause of the catastrophe was as follows: "Mr. Glenn: Will you state to the jury whether or not, in your opinion, from what you saw of this trestle and its timbers and iron rails, the whole structure and lie of the train, you saw there yourself, whether or not, in your opinion, this derailment or accident was caused by rotten timber or defective construction of this trestle? Mr. Graydon: I renew the objection I made this morning to that testimony." After argument, the court ruled: "I have looked into the matter some during the recess. The extent of my examination of the question was simply to refer to Stephen's Digest, and I found

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the rule there laid down that opinions of nonexperts are now receivable in this country in all cases where, after a mere observation, a description without an opinion would convey an inadequate idea of what the witness testified to. The general rule is, then, that such opinions are competent in those cases where, after a personal observation, a description without an opinion would convey an imperfect idea. It seems to me the ruling this morning, in view of that general principle, is wrong. The witness may testify to a condition of things prevailing, and it seems to me that the description of what the witness saw from his personal observation sufficiently enables the jury to form the opinion without the necessity of the witness expressing an opinion himself. So that I will reverse the ruling made this morning. Mr. Graydon: I move that the stenographer strike out from the testimony the opinion of Mr. Haverick. The Court: Yes, sir; will have that stricken out, and will instruct the jury now, that while you will take every fact testified to as to the condition of things, when a witness says in his opinion a catastrophe was not caused so and so, that opinion is not evidence for you to consider. You take the facts as he describes them, and determine for yourselves from those facts not only whether the accident or catastrophe could have been produced by the alleged cause, but whether, as a matter of fact, it was produced by the alleged cause." These exceptions are therefore overruled.

V. When the witness D. H. Davis testified, it was as a witness for the defendant, and he stated that he had been injured in the wreck, but was not very much injured. On the cross-examination, he was asked if he had been settled with by the railroad for his injuries, and his answer was that he had. After this testimony had been elicited the defendant objected. Upon the question of the relevancy of this testimony raised by the defendant the court held that it was relevant to the issue and that it was on cross-examination of defendant's witness. It seems relevant to us to a certain extent, at least. It was a recognition by the railroad that persons injured by the wreck were entitled to compensation therefor. This exception must be overruled.

VI. This exception relates to an alleged error of the circuit judge in allowing the plaintiff's witness T. F. Black, over the objection of the defendant, to testify that Davis, who was the telegraph operator nearest to the scene of disaster, did not say anything to him concerning his allegation that he had already sent a message to the defendant company apprising them of this disaster. To a certain extent it might be said that the testimony of the witness Black was in contradiction of Davis' testimony, but be that as it may, if this was an error it was of no moment to the defendant. This exception is therefore overruled.

VII-VIII. These exceptions relate to the alleged error of the circuit judge in his general charge to the jury, wherein he stated that the defendant railway cannot make a binding con-

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tract with a free or gratuitous passenger to relieve itself from more than ordinary negligence, and cannot make such contract to relieve itself from injuries received by such passenger on account of gross negligence; it being submitted by the appellant that it can make a valid contract with such passenger which will relieve it of liability on account of all injuries resulting from negligence, or gross negligence, and all other acts except such as are willful or wanton in their nature.

We do not think there was error in the circuit court as here complained of. The Constitution of this state (section 3, art. 9) provides: "All railroads, express, canal and other corporations engaged with transportation for hire * * * are common carriers. * * * It shall be unlawful for any such corporation to make any contract relieving it of its common law liability or limiting the same in reference to the carriage of passengers." Our courts have so holden. *Swindler v. Hilliard & Brooks*, 2 Rich. Law 286, 45 Am. Dec. 732; *Baker v. Brinson*, 9 Rich. Law 202, 67 Am. Dec. 548; *Wallingford & Russell v. Railway Co.*, 26 S. C. 258, 2 S. E. 19; *Johnson v. Railway Co.*, 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645. In the last-named case the court held: "A contract whereby a common carrier undertakes to secure immunity beforehand from liability from damages for injuries resulting from its negligence, or that of its servants or agents, is contrary to public policy, and therefore void." The Supreme Court of the United States, in *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535, held: A common carrier of passengers cannot lawfully stipulate for exemption from liability for personal injuries caused by the negligence of its servants, where the transportation of the plaintiff in its cars, although not paid for by him in money, was not a matter of charity nor of gratuity. The syllabus of this case was as follows: "A., who was the owner of a patented car coupling, for the adoption and use of which by a railway company he was negotiating, went at the request and expense of the company to a point on its road to see one of its officers in relation to the matter. A free pass was furnished by the company to carry him in its cars. During the passage, the car in which he was riding was thrown from the track by reason of the defective condition of the rails and he was injured. Held: (1) That the passage was given for a consideration, and that he was a passenger for hire. (2) That, being such, his acceptance of the pass did not estop him from showing that he was not subject to the terms and conditions printed on the back of the pass, exempting the company from any liability in any injury he might receive by the negligence of the agent of the company or otherwise." In the case of *Railway Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, the syllabus of the case is as follows: "(1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. (2) It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption

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from responsibility for the negligence of himself or his servants. (3) These rules apply both to common carriers of goods and common carriers of passengers, and with a special force to the latter. (4) They apply to the case of a drover traveling on a stock train to look after his cattle and having a free pass for that purpose. (5) Query, whether the same rules would apply to a strictly free pass? (6) Held, arguendo, that a common carrier does not drop his character as such merely by entering into a contract for limiting his responsibility. (7) That carefulness and fidelity are essential duties of his employment which cannot be abdicated. (8) That these duties are essential to the public security in his servants as in himself. (9) That a failure to fulfill these duties is negligence; the distinction between 'gross' and 'ordinary' negligence being unnecessary."

These quotations from the law are intended to apply to the case at bar, to the free pass, as it is called, issued by the railway to Mrs. T. F. Black, the intestate here. The ticket was as follows:

Face of paper: "Seaboard Air Line Railway Exchange Ticket. Pass Mrs. T. F. Black from Elberton to Petersburg. Account Witness. Good for ONE TRIP only, until Oct. 30th, 1904, unless otherwise ordered, when countersigned by C. A. Carpenter. Sept. 6th, 1904. J. M. Barre, President and General Manager. No. A 17261. Countersignature: C. A. Carpenter. Stop-over at Stations permitted."

Back of paper: "Conditions. This free ticket is not transferable, and, if presented by any other person than the individual named thereon, or if any alteration, addition or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare. The person accepting this free ticket agrees that the Seaboard Air Line Railway shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same. I accept the above conditions. Mrs. T. F. Black. This pass will not be honored unless signed in ink by the person for whom issued."

Upon comparison of the principles laid down in the cases we have just quoted with the views just presented by his honor in his charge, we cannot hold that he has violated any rules of law as pointed out in this exception, and the thirteenth ground of appeal is governed by the same rule as hereinbefore stated. The latest decision of the Supreme Court of the United States which in the least antagonizes the views of our own Supreme Court is that of the Northern Pacific Ry. Co. *v.* Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513. In this case it was decided that a party riding on a free pass when nothing whatever of value is paid is not entitled to recover. It was there declared by the court that this case was distinguished from the cases of *Railway Co. v. Lockwood*, *supra*, and *Railway v. Stevens*, *supra*, and was expressly confined to cases of ordinary negligence, and this last case was adopted by the circuit judge in his charge to the

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jury. It is palpable to this court that this was not a free pass, as is often the case, for in his evidence it is seen that money value or its equivalent was paid to the railroad therefor. It was a condition upon which the husband engaged in the service of its defendant railroad as a witness. It was similar to the Lockwood and Stevens Cases, and was left wisely by the circuit judge to the jury. We must therefore overrule these exceptions.

IX. These exceptions relate to the charge of his honor touching punitive damages. In 13 Cyc. 106, the author says: "The better doctrine seems to be that they [punitive damages] are usually given as a punishment to the offender, for the benefit of the community and a restraint to the transgressor." This is abundantly evident under the decisions of this court in *Samuels v. Railway Co.*, 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883; *Spellman v. Richmond & Danville Ry. Co.*, 35 S. C. 488, 14 S. E. 947, 28 Am. St. Rep. 858; *Mack v. Railway Co.*, 52 S. C. 344, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Duckett v. Pool*, 34 S. C. 311, 13 S. E. 542. The case for appeal also shows that there was testimony as to recklessness in that the schedule time for said railroad was 33 miles an hour, and that in crossing the trestle in question the train was running at a speed of 50 miles an hour. If there was any error in this charge, his honor's attention was not called thereto. *Burns v. Goddard*, 72 S. C. 361, 51 S. E. 917, where Mr. Justice Jones, speaking for the court, says: "Whatever may be the view elsewhere, our cases support the view that an instruction upon an issue as to which there is no evidence whatever or a mistake in stating issues, is not reversible error unless the attention of the court is called to the matter. *Vann v. Howle*, 44 S. C. 546, 22 S. E. 735; *Crosswell v. Association*, 51 S. C. 469, 29 S. E. 236; *State v. Still*, 68 S. C. 38, 46 S. E. 524, 102 Am. St. Rep. 657." This subject has been so often discussed by this court and its views so explicitly stated that we need not linger hereon. These exceptions are overruled.

X. In construing the judge's charge, it must be construed as a whole. The court told the jury that the injury of a passenger was prima facie evidence of negligence. See *Zemp v. Railway*, 9 Rich. Law, 84, 64 Am. Dec. 763; *Steele v. Railway*, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756. The circuit judge instructed the jury that the railway company was not an insurer of the lives of its passengers, but was only bound to exercise the highest degree of reasonable care for the safety of its passengers. These exceptions are overruled.

XI. This exception relates to an alleged error in his honor in refusing to charge the jury, at the request of the defendant, that plaintiff could not contradict the terms of the agreement on the part of Mrs. Rhoda B. Black as indorsed on the ticket or pass on which she was riding. Notwithstanding she has signed the same, as has been previously held by us in this case in disposing of the third exception, the request to charge did not represent the law. It was in the power of the plaintiff to show

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that there was something of value to defendant, as was held in the case of *Railway Co. v. Stevens*, supra. This exception is overruled.

XII. The error attributed to the presiding judge in this exception is his refusal to charge the eleventh request, which is as follows: "That if the jury find in this case that the pass upon which plaintiff's intestate was riding was issued pursuant to the telegrams offered in evidence by the plaintiff, and that such telegrams were sent and delivered in order named by T. F. Black, then such telegrams fail to show that the said pass was issued upon any pecuniary or other valuable consideration moving to the defendant." This charge was refused by the judge because it would have been a charge upon facts. We agree with the circuit judge. Therefore, this exception is overruled.

XIII. These four exceptions relate to error alleged in the circuit judge, when, on the second appearance of the jury, he addressed himself to them urging the propriety of their reaching a conclusion, if, according to their conscientious convictions, they could do so. In order that we may understand what transpired in the second charge of the judge to the jury, we reproduce the same as follows: On Friday morning, May 26th, the jury was called out. "The Court: Mr. Foreman, the jury have been considering this case now for some time, and it may have developed that there are matters of law, upon which the jury are disagreed and about which the court might aid you by giving you some further instructions. The Foreman: It is not. The Court: Then it may be that there are matters of fact about which the jury are disagreed, and upon which the court might give you some aid by having such portions of the testimony read over to you as have a bearing upon those questions of fact. The Foreman: It is not that. The Court: Then I take it that each juror understands the law of the case, and also has a clear conception of the facts of the case, and it is a matter of difference of opinion amongst you, which difference you have not yet been able to reconcile. Now, gentlemen, this jury has been charged with this case, and have been engaged with the hearing of it, and the consideration of the case after the hearing was had, for five days practically. It has been a case of considerable length and a case of considerable moment. It involves important issues, and for that reason the court, in the trial of the case, in the hearing of the case, restricted nobody as to time or as to any other means of arriving at a correct conclusion, and so it turns out that the case has consumed a great deal of your time, a great deal of the time of the court, and not only has it consumed time but it has already entailed a very large expense of labor and money to these litigants, as well as to the public, because it costs the public money to run the court. So I hope these facts will suggest to your minds the great importance of having this case ended. Now, it has got to be ended by a jury sooner or later, and I suppose in Abbeville county no jury could be assembled which would be more competent to deal with these issues and to agree upon

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a verdict than the jury which now has the case. That being true, it must come with a great deal of force to you, as it does to the court and to these parties engaged in this litigation—it must come with a great deal of force that the case ought to be ended and disposed of, and that you are the proper parties to do that. Now, if this jury were agreed that the defendant ought to have a verdict, that the plaintiff was not entitled to anything, there could be no delay in your writing a verdict. So I take it that that is not the case. Very well. If some of the jury think that plaintiff ought to have a verdict and others think that the plaintiff ought not to have a verdict—of course, that is one possible ground of difference to be conceived, and, as a matter of course, the court, under the statement already made by you, that you need no further instructions upon the law, and that you have a full conception of the facts from the testimony, could not give you any aid in arriving at an agreement. It may be that you all agree that the plaintiff ought to have a verdict, but that you cannot agree, or have not as yet agreed, as to what your verdict should be. Well, if that be the case, the court has no power, no means at its command to aid you in settling that difficulty. But if that be the case, then your labors ought to come to an early conclusion, because I take that an intelligent jury, seeking to arrive at a just conclusion, if you are all of the opinion that a verdict ought to be rendered on one side or the other, ought to be able to arrive at some common ground, and bring that in as your verdict. Now, whatever may be the ground upon which you differ—and the court has neither the right nor the desire to know about those matters—still you understand the vast importance of having an agreement, so that the case may be finally disposed of. As I have already said, it has cost you a great deal of time and labor, because you sit here listening to a case that requires the exertion of your intellectual facilities and energies, and as well, a strain upon physical powers; and then when you go to consider a verdict that, again, is a tax upon your energies, both of mind and body. So it has cost you a great deal of labor already, as well as a great deal of time, and probably has cost you a good deal in the fact that you are forced in rendering this service to your country, this patriotic service, in a greater or less degree to allow your private business affairs unattended to, neglected. Now, then, you ought to consider that as a very strong reason why you should get together and agree upon a verdict, and not only that, but other sources of expense that the court has already indicated, the expense to the public, the expense to each of these litigants. I am quite sure these facts appeal to you as reasons why you ought to bend all your energies and direct all your efforts to the sole object of arriving at a verdict. Now, no juror is required in a civil case to sacrifice his conscientious convictions. You are all sworn to well and truly try and a verdict render, and no one of you is forced, or ought to feel constrained, to violate that oath. Each of you ought to well and truly try the case and make up your mind as to what ought to be the ver-

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dict in the case. Then, as a matter of course, each of you ought to compare his own conclusion which he has arrived at, with the opinions of his fellow jurors, and seek to arrive at some common ground of agreement that will be your verdict. If any juror disagrees with his fellow jurors and it is a matter of conscience with him, so that he would feel he has violated the oath he has taken if he yielded the position he holds, of course he ought not to yield that position. But if it is not a matter of conscience, but merely a matter of difference of opinion, then it is your duty to harmonize your opinions. Probably there never has been tried a case by 12 intelligent men, in which there was an absolute identity of opinion amongst all 12 of the jurors about the case, and the very fact that intelligent minds do differ makes it inevitable that every verdict should be not, probably, a direct expression of any man's opinion, but an expression of your harmonized opinions. You put your opinions together and compare them. Wherever they agree, why, there is no necessity for any harmonizing. Wherever they differ, then the difference ought to be considered, and unless differences go to the conscientious convictions of the respective jurors, then those differences ought to be reconciled. In one sense, every verdict is a compromise, and I don't mean that in the sense in which the word is generally used, and yet it is a harmonizing of the conflict between the opinions of the jurors the conflicting view of the jurors; and that is what a jury who find some difficulty in agreeing in a case ought to feel it incumbent upon themselves to do—compare their differences, and reconcile them, if possible. As I have said, you have been engaged for quite a long time in considering this case, and I feel sure that no juror amongst you will be willing to surrender the case without arriving at a verdict, so long as there is a probability of your being able to agree. I don't say possibility of an agreement, because all things are possible, all things of a human character, and I don't propose to keep you confined in the consideration of this case until the last possibility of an agreement is exhausted, because it would be possible for the court to keep you there for quite a while. But I conceive it to be my duty, and I cannot conceive that any of you would differ with me in that, and I believe, therefore, you consider it to be your duty, still to try to arrive at a verdict in this case. It is my duty to give you all the time necessary to enable you to arrive at the verdict or to demonstrate the impossibility or the extreme improbability of your ever agreeing upon a verdict, and for that reason the court will give you further time to consider the case. Either now or in your further consideration of it, the court will, of course, be glad at all times to aid you in any way possible. Your comfort will be looked after so far as it is in the power of the court to do so, and I hope up to this time your comfort has been administered to so that you have not suffered any serious discomfort other than the fact that you are still kept in the consideration of the case; and a case requiring as much time to try as this one did, involving the issues which it does, and comprising the vast amount of evidence

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that was offered in the case, necessarily requires longer for a jury, if it cannot at once arrive at a conclusion, to canvass all the phases of the case, all the facts, the evidence in the case, before it finally gives it up as something that is beyond its power to arrive at an agreement on. Well, now, I think you gentlemen understand the importance of your arriving at an agreement; the importance to yourselves as jurors—I don't mean to yourselves individually, to your individual interest, but to yourselves as a jury—and the importance to all the interests involved in the case, which are committed to you now to be determined and adjusted by your verdict. So you may retire, gentlemen, and proceed with the consideration of the case, and when you have arrived at a verdict, if you should, or if, in the further consideration of the case, you find that you desire any aid that the court can give you, you will let it be known, and it will be offered to you to the fullest extent within the power of the court. You may retire."

An examination of this charge will show that there was no request by the jury for its discharge; such being the case, the law did not require the circuit judge to discharge the jury, especially as he had brought them into court of his own motion. It is important that the trial of causes should be ended. A circuit judge is but discharging his duty to the public, and especially to the litigants, when he urges the jury to reach a verdict, provided nothing like coercion takes place. We therefore overrule these exceptions.

XIV. This exception relates to the refusal of the circuit judge to charge the twelfth request of the defendant, which is as follows: "If railway companies exercise their functions in the same way with prudent railway companies generally, and furnish their road and run their trains in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them, and if the jury in this case find that the defendant constructed, maintained, and inspected its trestle in the manner generally found and believed by prudent railways to be safe, and that it was operating its trains in the customary manner which is generally found and believed by prudent railway companies to be safe, then the jury must find for the defendant." The circuit judge is here requested to lay down a proposition of law which we do not regard as sound. In *Bodie v. Railway Co.*, 61 S. C. 468, 488, 39 S. E. 715, 722, it is said: "The charge made the usual, customary way of doing things a conclusive test whether due care is exercised therein, whereas, that is merely evidence which should go to the jury along with the other evidence, leaving the jury to determine from all the evidence whether due care was observed. The usual, customary way may not be a negligent way, but in this the court left the jury no discretion but to find that plaintiff was not negligent, if he was doing the work in the usual, customary way. In the case of *Bridger v. Railway Co.*, 25 S. C. 24, the circuit court declined to charge that: "The degree of care required of defendant is only such as is exercised by well-regulated railroads

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over their turntables, and if defendant exercised such care in this case, there was no negligence,' saying that other railroads' negligence could not excuse negligence by this defendant, and that it was for the jury to say whether there was negligence here." Our Supreme Court held that there was no error in this. In *Lowrimore v. Palmer Mfg. Co.*, 60 S. C. 168, 38 S. E. 436, where a similar request was refused by the circuit court, this court, through Chief Justice McIver, as its organ, overruled the exceptions to the refusal to charge. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J., concurs with the limitations expressed in the opinion of MR. JUSTICE WOODS.

ST. LOUIS, I. M. & S. RY. CO. *et al.* v. HATCH *et ux.*

(Supreme Court of Tennessee, June 30, 1906.)

[94 S. W. Rep. 671.]

Carriers—Passengers—Indignities—Negligence—Evidence—Sufficiency.—In an action against a railroad company and a sleeping car company for indignities received by a passenger from outsiders, evidence examined, and held sufficient to justify a verdict accepting plaintiff's contention as to the extent of the outrage and the negligence of defendant's employees.

Same—Sleeping Car Companies—Care Required.*—A sleeping car company is bound to exercise only ordinary and reasonable care and diligence in watching over its passengers to protect them from injury.

*For the authorities in this series on the subject of the duties and liabilities of sleeping car companies with respect to passengers, see *Ft. Worth & D. C. Ry. Co. v. State* (Tex.), 18 R. R. R. 352, 41 Am. & Eng. R. Cas., N. S., 352 (sleeping car company's contract to furnish cars for railroad company did not violate Anti-Trust Law of Texas, by interfering with transportation of passengers, etc.); note appended to *Pullmans' Palace-Car Co. v. Lawrence* (Miss.), 8 Am. & Eng. R. Cas., N. S., 59 (liability as common carriers; and liability for assaults on passengers by employees); note appended to *Pullman Palace Car Co. v. Harvey* (Ga.), 10 Am. & Eng. R. Cas., N. S., 77 (liability for loss of passengers, property); *Pullmans' Palace-Car Co. v. Martin* (Ga.), 2 Am. & Eng. R. Cas., N. S., 475 (theft of passenger's property); *Dawley v. Wagner Pal., etc., Co.* (Mass.), 8 Am. & Eng. R. Cas., N. S., 766 (theft, liability question for jury); *Connell v. Chesapeake & O. R. Co.* (Va.), 5 Am. & Eng. R. Cas., N. S., 333 (murder of passenger); *Pullmans' Palace-Car Co. v. Hall* (Ga.), 14 Am. & Eng. R. Cas., N. S., 229 (Liability for theft); *Edmundson v. Pullman's Palace-Car Co.* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 336 (injury to passenger's health from window of berth being left open); *Pullman Palace-Car Co. v. Hunter* (Ky.), 17 Am. & Eng. R. Cas., N. S., 204 (Liability for theft); *Cooney v. Pullman Palace-Car Co.* (Ala.), 18 Am. & Eng. R. Cas., N. S., 588 (liability for loss of baggage); *Felton v. Horner* (Tenn.), 8 Am. & Eng. R. Cas., N. S., 79 (liability for assault by employee).

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Same—Ordinary Carriers.†—A carrier of passengers must exercise a high, if not the highest, degree of diligence to protect its passengers from employees, fellow passengers, and strangers.

Appeal and Error—Review—Harmless Error—Instructions.—A railway company cannot complain, in an action based on its negligence, that the trial court imposed a lower burden upon it, as to the care required, than the law would exact.

Same.—A sleeping car company, sued as a codefendant with a railway company for injuries suffered through the negligence of defendant's employees, cannot complain that an instruction correctly stating the diligence required of the sleeping car company imposed a lower burden upon the railway company than the law would exact.

Carriers—Passengers—Care Required.†—Where the employees of a railway company and of a sleeping car company have been negligent in leaving the car for a long period, and in failing to answer bells, they cannot escape liability for indignities offered a passenger, on the ground that there was no reason for supposing that any such wrong would be committed.

Trial—Instructions—Repetition.—Where the court correctly lays down the law applicable to the case, without undertaking to state the theory of either party, it is not error to refuse instructions embracing the theory of one party, even though the propositions of law therein embodied are sound.

Appeal and Error—Reservation in Lower Court—Motion for New Trial.—Assignments of error not called to the attention of the trial judge in a motion for a new trial, as required by rule of the lower court, cannot be considered on appeal.

Error to Circuit Court, Shelby County; Walter Malone, Judge.

Action by Howard Hatch and another against the St. Louis, Iron Mountain & Southern Railway Company and another. Judgment in favor of plaintiffs, and defendants bring error. Affirmed.

Ewing & Williamson, for plaintiffs in error.

McFarland & Canada and *Thos. H. Jackson*, for defendants in error.

BEARD, C. J. Mrs. Hatch, one of the defendants in error, accompanied by three small children, the oldest of them being only five years of age, took passage on a train of the railway company, named above as one of the plaintiffs in error, at Houston, Tex., to make the journey from that point to Memphis, Tenn. Having a ticket not only of the railway company, but of the Pullman Company, she took passage in a car of the latter company, constituting a part of the train on which she was a passenger. Her route carried her through Texarkana, Ark., which point she reached about 10 o'clock at night. There it was necessary for her to change sleepers, she having ridden in a St. Louis sleeper from Houston, Tex., to that place. Traveling without her hus-

†For the authorities in this series on the subject of the duty to protect a passenger against other persons, see foot-notes appended to *Nashville, etc., Ry. Co. v. Flake* (Tenn.), 16 R. R. R. 552, 39 Am. & Eng. R. Cas., N. S., 552.

For the authorities in this series on the subject of the liabilities of carriers for assaults upon passengers, see foot-notes appended to *Foster v. Grand Rapids Ry. Co.* (Mich.), 17 R. R. R. 512, 40 Am. & Eng. R. Cas., N. S., 512.

For the authorities in this series on the subject of the degree of care due a passenger, see foot-notes appended to preceding case.

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band or any male attendant, and having charge of her three small children, a Mr. Tucker, a citizen of Memphis, who was a passenger with her from Houston, aided her in making the change at Texarkana. In the sleeping car to which she was transferred there were three passengers besides herself and her children. When the change was made the berths that were to be occupied by these passengers had already been made up by the porter of the sleeper. She was assigned to the lower berth of section 12. This berth was at the rear of the car, as the train was going towards Memphis, and next to the drawing room. The berth assigned to Mr. Tucker was about the center of the car. Across the aisle from him a lady, whose name is unknown, occupied the lower berth of that particular section.

Immediately upon this change having been made, Mrs. Hatch prepared her children to retire for the night, and placed them in the berth to which her ticket entitled her. Having done this, she took a seat, immediately opposite this berth. Being in delicate health, this seat was taken in order that she might have the benefit of the fresh air which came through the open window. According to her testimony, she sat there for an hour, and then dropped off to sleep, from which she was suddenly aroused, according to her testimony, by the appearance of two men whom, at the moment, she thought to be robbers. One of these parties had a revolver protruding from his hip pocket, and the other wore a slouch hat and was in his shirt sleeves, having his coat under his arm. She was accosted by these parties, one of whom put his arms around her and made her an indecent proposition. She struggled to get away, and at last, with almost superhuman strength, according to her statement, she broke away from the man and in doing so fell against the car and cut her head. While this was taking place, there was neither conductor nor porter in the car within range of her vision. Mr. Tucker had retired, and the lady opposite was also in her berth. The only other person who was up at that time was a Mr. Polonius, who, according to his statement, was seated in the smoking department and at its further or front end. Mrs. Hatch states that, immediately after she was released, these two men left, going toward the St. Louis sleeper, which was immediately in the rear; that she at once twice rang the bell and no one came to her aid; that she then rushed to Mr. Tucker's berth, calling upon him for assistance, when she saw these men coming back, and as they passed her one of them patted her on the cheek, attempted to put his arms around her, and applied to her terms of endearment.

From this alleged outrage upon her, and its alleged effect upon her sensibilities and health, the present suit was brought; her husband joining as a coplaintiff. The averments of the declaration cover the statements which she afterward detailed in her testimony as a witness upon the trial of the suit, and were, in substance, as set out above. The gravamen of her complaint is that the plaintiffs in error failed to render her that care and

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watchfulness with a view to her protection as a passenger which the law exacted of them. Upon the trial of the case, the jury rendered a verdict of \$4,500 against the two companies, and, their motions for new trial having been overruled, an appeal in the nature of a writ of error from the judgment rendered on that verdict has been prosecuted by them.

To show negligence upon the part of the two companies, Mrs. Hatch testified that from the time the conductor, immediately after she had entered the sleeper at Texarkana, took up her tickets, until she fell asleep, a period of one hour, no one but the passengers were in the sleeper, and that it was only after these two men disappeared, or were in the act of disappearing, from the car, subsequent to the outrage complained of, she saw the conductor and porter; that not only did she get no response to the bell, which she twice rang, but that, while she sat by the window before falling asleep, the lady in the berth across the aisle from Mr. Tucker rang several times and failed to get a reply from any one in charge of the car. She states that, when she was aroused from sleep, at least two hours had elapsed from the time of taking her seat by the window, and that it was about 12 o'clock when she called Mr. Tucker. The latter was examined as a witness in the case, and he testified that he never saw Mrs. Hatch before the morning of this incident, and that he helped her with the children from one car to the other at Texarkana, as she had already testified. He then added: "I do not recall the time, but I think it was about half past 10 that I retired to my berth, having disrobed as I would have at home, and I was soon asleep. I think it must have been 12 o'clock, it may have been sooner or later, that I heard her voice: 'Oh, Mr. Tucker! Oh, Mr. Tucker! These men are interfering with me.' I was aroused from sound slumber, and did not know what it was, and a moment later I heard the voice right outside of my berth, and I put my head out and said, 'What's the matter?' and I saw two men walking down the aisle, and they had their backs turned toward me, and I spoke pretty roughly to them, and one of them said something and went on."

Mr. Tucker states that, being thus roused by Mrs. Hatch, he dressed as rapidly as possible, and, upon ascertaining from Mrs. Hatch what had occurred, he took his pistol and went forward for the purpose of finding these men. When asked with regard to the conductor, and as to when he found him, he made the following reply: "It was some time afterwards. I do not know hardly that I could gauge time under such circumstances, but it was near 10 or 12 minutes after that. But the impression to me was that he came in the back of the car." The record shows that the sleeping car conductor was in charge of both the Memphis and St. Louis sleepers, and was at the time riding in the latter sleeper. With regard to the porter, as well as the conductor, the following questions and answers were made by him:

"Q. And do you not know during that time of a porter or conductor being in the car?"

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"A. No, sir.

"Q. And the porter came into the car after the occurrence?

"A. Yes, sir; that is my impression."

On cross-examination, Mr. Tucker stated that he was quite sure that he did not see the porter until he returned to the sleeping car after having made a search in the car in front for the men who had committed this outrage. He was then asked by the counsel for the defendants below if it was not possible that the porter may have gone forward and returned to the other car in search of the conductor, while he (Tucker) was making his search, and he says that he does not think such was the case, for the reason that he was sitting on the edge of his berth slipping on his shoes preparatory to the search which he immediately started upon, and he does not think it possible for any one to have passed without his noticing it, and if any one had attempted to pass he would certainly have known it.

This cross-examination to which Mr. Tucker was subjected was in view of the testimony which was subsequently elicited from the porter of the car, who stated that he was in the lady's toilet in the rear of the sleeper cleaning up broken glass at the time, and heard the alarm and rushed out, meeting the lady (meaning Mrs. Hatch) five feet from the door in the aisle, and she said, "Oh, Porter, there are two drunken men in the car," and with surprise at the statement he rushed to the front in search of the men; that he did not see any one, and he said to the man in the smoking apartment, "Did you see any men in the car there?" but he added that he thought he saw the back of one of the men as he passed out of the far end of the sleeper; "that the men disappeared about the time Mrs. Hatch spoke to him." The porter further stated that he was absent from the body of the car but two or three minutes; that at the time he left it Mrs. Hatch appeared to be sleeping, and that all the passengers had retired with the exception of the gentleman who was in the smoker; that, if the bell was rung, he did not hear it, as it was situated at the opposite end of the sleeper, separated from him by the swinging doors and the closed doors of the apartment in which he was, for a short space of time, engaged in gathering up the broken fragments of glass which had fallen to the floor.

In addition to the testimony of the porter, who according to his statement, was engaged from time the train left Texarkana until two or three minutes before this outrage, in a diligent watch of the car, the plaintiffs in error introduced as witnesses Mr. Polonius (the gentleman who sat in the smoker), who stated that he saw the two men in question pass the door of the smoker going in the direction of the front of the sleeper, and that his attention was attracted to them by some peculiarity of their dress; that afterward Mr. Tucker came by on his search for them; and that, being advised that something unusual had occurred, fearing Mr. Tucker might get into difficulty and need assistance, he accompanied him. Failing in the search, they returned to the sleeper, and found Mrs. Hatch, and the two then

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had a conversation with her, in which they undertook to quiet her apprehensions. According to the testimony of Mr. Polonius, the impression made upon him by Mrs. Hatch was that the wrong of which she complained, and which had given her the alarm, was that, in passing, one of these men had stumbled and put his hand into her berth or parted the curtains. In other words, according to his statement, the incident was of trifling importance, with regard to which Mrs. Hatch was unnecessarily alarmed. The jury, however, accepted the testimony of Mrs. Hatch, not only with regard to the outrage, but also as to the protracted absence of the conductor and the porter from the car, and we see no reason on this record why they should not have so done. It follows that there is material evidence supporting the averments of the declaration, both with regard to the extent of the outrage, the conditions under which it was perpetrated, and the absence from the car of those whose duty it was to exercise care and watchfulness, not only of the property, but also of the persons, of those committed to their custody.

The trial judge in this case gave an admirable charge to the jury. It was clear in its statements, and, without being meager, had the quality of brevity which, added to its clearness, made it what a charge should be, an intelligent guide to the jury in making up their verdict. The only error in the statement of the proposition of law which was made was in favor of the railroad company, in that he stated that with regard to it, as well as the Pullman Company, the rule of law was that only ordinary and reasonable care and diligence in watching over its passengers to protect them from assault and injury was required. This was a sound proposition, so far as the Pullman Company was concerned, but not as to the railroad company. From the latter the law exacts a high degree of care and vigilance as to passengers. While not an insurer, the carrier of passengers has put him under the burden of exercising a high, if not the highest, degree of vigilance to protect his passengers, not only from his own employees, but from fellow passengers and from strangers. So it is that the railway company cannot complain in that the trial judge imposed a lower burden upon it than the law would exact. Nor can the Pullman Company be heard to complain, for whatever error was committed in that respect by the trial judge did not result in injury to it, inasmuch as the proposition of law announced, so far as it was concerned, was sound.

But the insistence is made for both companies that, as they had no reasonable ground for suspicion that these parties would enter the sleeper and commit this wrong, neither can be charged with negligence or held liable for the injury resulting to Mrs. Hatch from this wrong.

It is true that the rule of law is, as announced in *Ferry Cos. v. White*, 99 Tenn. 263, 41 S. W. 583, 585: "If there was nothing on the part of the passengers or otherwise to create in the minds of any reasonable person any apprehension of danger, the defendant cannot be charged with negligence or held liable for in-

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juries resulting therefrom." This principle is supported by many authorities, relied on by plaintiffs in error especially, and is emphasized in the cases of *Connells, Executor, v. C. & O. Ry. Co.*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786, and *Batton v. S. & A. R. R. Co.*, 77 Ala. 591, 54 Am. Rep. 80.

The principle announced by these cases, which is a limitation upon the general rule of liability of the carrier, is altogether sound, but it comes into play as a matter of necessity, only when the carrier is diligent in discharge of his general duty to his passengers; in other words, is not guilty of negligence. It was not in the mind of any court announcing this principle that where the carrier was guilty of abandoning his post, where only he could discharge this duty, that the law would come in to excuse him from liability for an injury resulting from such negligence, because he had neither known at the time or anticipated that the wrong would be perpetrated. It would hardly be contended that, where an outrage was inflicted by either a fellow passenger or a stranger upon one traveling upon a railroad train, who was entitled by his passenger relation to vigilant care upon the part of the carrier, the carrier would be absolved from liability for this wrong, because it neither knew nor reasonably anticipated it, when it appeared that the employees in charge of the train were gathered in the baggage car, or in some other remote part of the train, where they had been for hours before the outrage occurred and at the time of its occurrence. The very fact that they were so gathered was negligence upon their part, which contributed to the injury, and in such case the rule announced in the *Ferry Co.'s Case*, and the other cases referred to, would have no application. No more could it be applied in the present case, as it was made out by the plaintiff below and accepted by the jury, where the conductor disappeared immediately after taking up the transportation of Mrs. Hatch, as did also the porter, absenting themselves from the car in which she was riding during the interval of time which elapsed between leaving Texarkana and 12 o'clock at night. There was, in this absenting themselves from the sleeper for this period of time, and failing to answer the numerous bells that were rung, neither the vigilant care exacted of the railroad company, nor the reasonable care required of the Pullman Company.

But it is said on the part of the Pullman Company, that the trial judge was in error in declining to give certain special requests that were submitted by its counsel. These requests embraced the theory of that company upon certain proven facts with the propositions of law which it sought to have applied to that theory. Granting that they were entirely sound, yet we think that the trial judge cannot be put in error for declining to give these, inasmuch as he did not undertake to state the theory of either party to the lawsuit, but laid down, in general terms, and with unusual clearness, sound propositions of law which would guide the jury in reaching a correct solution of the case, as they

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might adopt the theory of facts of the plaintiffs or of the defendants.

So far as the more important assignments of error submitted for the railroad company are concerned, we do not think on this record that they are well taken. The matter of complaint embraced in these two assignments were not called to the attention of the trial judge, in the motion for a new trial, as was required by a rule of that court, and therefore cannot be considered here. Even, however, if it was otherwise, in view of the charge given, there is nothing of which it can complain.

Judgment affirmed.

GEORGIA RY. & ELECTRIC CO. v. BAKER.

(Supreme Court of Georgia, May 18, 1906.)

[54 S. E. Rep. 639.]

Carriers—Street Railroads—Transfers.*—Although a street railway company may not be required by law to carry a passenger on any other line than the one over which the car originally boarded runs, still, if such company holds out that it will, when fare is paid on the first car, issue a transfer giving the right to ride on other cars of its lines, a request for a transfer is an acceptance of this offer, and the delivery of the transfer completes a contract under which the passenger is entitled to demand the right to ride on both the original car and the transfer car; and the amount paid to the conductor of the first car is the consideration for the right to ride on each car. The right to ride on the car to which the passenger is transferred is in no sense a gratuity.

Same—Mistake in Transfer.*—If a mistake is made by the conductor of the first car in issuing a transfer, and the passenger presents the transfer to the conductor of the second car and gives a reasonable explanation of the mistake of the conductor of the first car, the conductor of the second car must at his peril determine whether the passenger is entitled to ride upon the transfer, notwithstanding it does not upon its face show such right.

Same—Unreasonable Conditions.*—A condition on a transfer issued by a street railway company that "the holder, by accepting, agrees that, should any controversy arise as to its validity, holder will pay fare and call at company's office for correction," is unreasonable and void.

Same—Threatened Expulsion.—A threat by the conductor of the second car to expel a passenger on account of a mistake in the transfer slip is a legal wrong, giving the passenger a right of action against the company, notwithstanding there is nothing insulting in the words

*For the authorities in this series on the subject of street railway transfers, see foot-notes appended to *Virginia P. & P. Co. v. Commonwealth* (Va.), 18 R. R. R. 135, 41 Am. & Eng. R. Cas., N. S., 135; *Reynolds v. Pacific Elec. Ry. Co.* (Cal.), 17 R. R. R. 658, 40 Am. & Eng. R. Cas., N. S., 658.

For the authorities in this series on the subject of the duty of conductors to respect explanations of passengers as to cause of failure to have tickets or the proper tickets, see foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S., 340.

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or manner of the conductor, further than a mere threat to expel might be deemed an insult.

Same—Damages.†—In an action brought to recover damages for a threat to expel a passenger from a street car, who presented a transfer to the conductor which was defective through no fault of the plaintiff, but who, under the facts of the case, was entitled to a ride on the car, the measure of damage is not limited to the amount paid to prevent an expulsion, but general damages may be recovered as for an inexcusable trespass, even though there be no aggravating circumstances connected with the threat of expulsion.

Trial—Instructions—Evidence to Sustain.—While the evidence demanded a finding in favor of the plaintiff so far as the right to recover was concerned, the erroneous instruction in relation to the worldly circumstances of the parties was of such a character as to require the granting of a new trial.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by C. L. Baker, by her next friend, against the Georgia Railway & Electric Company. Judgment for plaintiff. Defendant brings error. Reversed.

Mrs. Baker sued the street railway company for damages. The petition alleged that she boarded a car of the defendant at Grant Park, in the city of Atlanta, about 3:30 p. m.; that she paid her fare and requested of the conductor a transfer to the Marietta Street Line, and in response a transfer was given to her by the conductor. On arrival at the transfer point established under the rules of the company, she inquired how long she would have to wait for a Marietta Street car, and the conductor told her that the car was then approaching and pointed to it. The plaintiff alighted, and immediately boarded the Marietta Street car, which was the first car on that line passing after her arrival. The conductor of this car approached plaintiff, and she gave to him the transfer slip which had been given to her by the conductor of the other car. The conductor refused to honor the transfer, and demanded that she pay another fare, threatening to eject her if she refused to do so. This was all done in an insulting manner; the conductor charging her with having had the transfer since 11 o'clock a. m. The bell was rung in order to eject her, and she paid to the conductor a fare. He was proceeding to eject her at the time, and she paid the fare under protest. The car was filled with passengers, and the threats of the conductor that he would eject her were made in the presence of these passengers, among whom were a number of her acquaintances. She was humiliated and mortified, and her

†For the authorities in this series on the subject of the liabilities of carriers of passengers for insults by their employees and the damages recoverable therefor, see foot-notes appended to *Cincinnati, etc., Ry. Co. v. Harris* (Tenn.), 19 R. R. R. 762, 42 Am. & Eng. R. Cas., N. S., 762.

For the authorities in this series on the subject of the right to recover damages for mental suffering of passenger wrongfully ejected, see foot-notes appended to *Georgia Ry. & Elec. Co. v. Baker* (Ga.), 13 R. R. R. 259, 36 Am. & Eng. R. Cas., N. S., 259.

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feelings greatly wounded. The petition avers that it was the duty of the defendant to carry her to her destination on Marietta street without extra pay, and she prays for damages, actual, punitive, and vindictive. Damages were laid in the sum of \$1,500. By amendment, a copy of the transfer slip is exhibited to the petition. Upon this transfer appears the following: "This transfer is good for one continuous trip on the route punched, provided it is presented at the first intersecting point by the person to whom originally issued, and used on the date and before the expiration of time punched, and upon first car passing transfer point for route shown, and is otherwise subject to the rules of the company. * * * This transfer is issued upon further condition, and holder by accepting agrees, that should any controversy arise as to its validity, holder will pay fare and call at company's office for correction." On the transfer appears the names of the streets on which the lines of the company run. The street on which the first car was boarded is marked by a punch. Marietta street is not so marked, but there is a punch mark on Magnolia street. The punch marks indicate 11 o'clock as the hour at which the transfer was issued. But this mark does not appear in the column headed "A. M.," or in the column headed "P. M." The defendant filed an answer, in which it admitted some of the allegations of the petition and denied others. The defense set up was in effect, a denial of liability, on the ground that the transfer did not upon its face confer the right to ride. The allegations as to the alleged wrongful conduct of the conductor were all denied. The trial resulted in a verdict in favor of the plaintiff for \$60. The defendant excepted to the judgment refusing a new trial.

Rosser & Brandon and *Walter T. Colquilt*, for plaintiff in error.

O. E. & M. C. Horton, for defendant in error.

COBB, P. J. (after stating the foregoing facts). It is conceded that there is no law of this state, and no valid ordinance of the city of Atlanta, requiring street railway companies to issue transfers to passengers, authorizing them to ride upon a car other than the one which they originally board. This fact being conceded, the argument is made that the right to ride upon the second car, resulting from the issuance of the transfer, is a mere gratuity. This is not true. The issuance of transfers is a voluntary act on the part of the company, using the word "voluntary" in its ordinary sense. The company is not bound to issue transfers. It is under no obligation to transfer the passenger to any other point than one on the line of the car originally boarded. But when the company voluntarily and without any compulsion adopts the custom of issuing transfers for the consideration paid the conductor of the first car, it binds itself by a contract to transport the passenger from the point where he enters the car to a point on any line to which, under the custom of the company, it is usual to issue transfers. In the absence of a custom, the company

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simply sells to the passenger, for the fare paid, the right to ride between points on the first line. Under a custom of issuing transfers, the offer is made for a stated consideration to transfer the passenger from a point on one line to a point on any other line embraced within the custom. When the passenger pays his fare to the conductor of the first car and requests a transfer, and a transfer is delivered, the offer arising under the custom is accepted, and the contract becomes complete, and the one fare is the consideration for the transportation of the entire journey. The company does not contract merely for the journey on the first line and donate a journey on the second line. Some companies will issue tickets entitling passengers to six rides for 25 cents, when the usual fare paid is 5 cents for each ride. No one would seriously contend that only the first five rides, under such circumstances, were paid for, and the sixth was a mere donation. The company is in the business of selling rides. It may fix the amount which shall be paid for a ride upon either one or more cars. When this amount is paid, the passenger is a purchaser of a ride between the points covered by the contract. This is true, whether, as an original proposition, the passenger could demand a right to ride between these points for the amount paid or not. The position that the transferred passenger is receiving a mere gratuity when he rides upon the second car is untenable.

2. Whether the transfer slip used by a street railway company is to be looked to as conclusive evidence of a right to ride on the second car, and whether any mistake made in the issuance of the transfer, resulting in its showing upon its face that the right to ride upon the second car does not exist, is a question about which the courts are not agreed. According to some of the decisions, the transfer received must be considered as conclusive evidence of the passenger's right to ride, although it may not in its true sense express or evidence the contract into which the passenger enters. These decisions hold that, if the transfer is inaccurate, the expulsion of the holder upon refusal to pay additional fare is justified, although the mistake or defect is due to the negligence of the conductor who issued the transfer. On the other hand, there are numerous cases which deny the transfer such conclusive force and dignity. These cases rule that the passenger has a right to rely upon the acts and statement of the conductor issuing the transfer, and if he is expelled from the second car on account of a mistake or defect in the transfer, notwithstanding he has acted in good faith and offered a reasonable explanation, the carrier is liable in damages for such expulsion. See the cases cited in *Hornesby v. Ga. Ry. & Elec. Co.*, 120 Ga. 913, 48 S. E. 339, and in the note to that case in 1 Am. & Eng. Annotated Cases, 392. In the *Hornesby* Case it was held that when a street railway company voluntarily offered to passengers the right to a transfer from one of its cars to another, to continue the journey without the payment of additional fare, it was reasonable to require, as a condition precedent to the exercise of this right, that the passenger should tender to the conductor

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of the second car a punched transfer ticket, which must be used within the time indicated by punched marks, provided a car upon which the passenger could be conveniently and comfortably transported passed the transfer point within the time so limited. The question now before us was not directly involved in that case. Attention was then, however, called to the conflict of authority above referred to on the question now under consideration. We think that our rulings in reference to tickets issued by ordinary railway companies are more in line with those authorities that hold that the transfer slip is merely evidence of the contract, and that if any mistake is made in issuing the transfer, so that it does not express the true contract, the conductor of the second car, on presentation of the transfer and a reasonable explanation of the mistake that appears on the slip, would at his peril decline to transport the passenger, if, as a matter of fact, a proper transfer was called for and the passenger was in no fault in reference to the matter. And we think this is the true rule. As was aptly said by Caldwell, J., in *O'Rourke v. Citizens' Street Railway Co.*, 103 Tenn. 132, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639: "It is the contract, and not the ticket, that gives the right to transportation. The ticket is but an evidence of the contract, made out and furnished by the carrier; and if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance. The passenger is not required in law, nor allowed in fact, to print or write or stamp the ticket. The carrier alone has that right, and the passenger is authorized to believe and presume that it will be properly exercised, and that the ticket, when delivered, is a faithful expression of the contract as made."

In the case just quoted from, there was printed on the transfer a statement requiring the passenger to examine the date, time, and direction, and see that the transfer was correct. There was also a statement that the passenger accepting the transfer agreed to "read and be bound by all the conditions on the back" of the same, "subject to the rules of the company. These conditions, so far as they required the passenger to read the transfer and examine the date, etc., were held to be unreasonable for two reasons: In the first place, the time usually occupied in making a trip on street cars was not such as to permit a compliance with the regulation; and, in the second place, if there was time for the purpose, the transfer was more or less complicated in its nature, and an inexperienced, though intelligent, passenger, who happened to be unacquainted with the system of punch marks, names of streets, etc., of the particular company, would be unable to ascertain whether it was correctly issued or not. In that case the transfer was of such a character that even an intelligent officer of the company, who testified as a witness, was unable to explain the system to the satisfaction of the trial judge. As was said by Caldwell, J., in the opinion: "It cannot be fair, or just, or reasonable, to require passengers, in the hurry of rapid street car travel, to decipher at their peril a check, whose meaning so in-

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telligent a judge cannot ascertain by careful and deliberate inspection." In *Laird v. Pittsburg Traction Co.*, 166 Pa. 4, 31 Atl. 51, a similar condition on a transfer check was under consideration, and it was said: "If that is intended to be regarded as a reasonable regulation, the check should be given to the passenger before he leaves the car a sufficient length of time to afford him at least an opportunity of reading it, and, if wrong, having it corrected." The contract between the carrier and the passenger is made by the offer held out by the company, although voluntary on its part, to transport the passenger on two lines. The transfer slip is mere evidence of the right to ride upon two lines, and if there has been in fact a contract between the passenger and the agent of the company in charge of the first car, the right to ride upon the second car is complete, although the evidence of the right is defective. We are aware that this rule may lay the carrier open to imposition in some cases. But, on the other hand, a contrary rule would impose upon the traveling public, and especially those members of it who are inexperienced and uninformed, a serious burden, and one which it is not reasonable or proper that they should be compelled to carry. It is true that the carrier is under no obligation to make the contract, but, when it voluntarily enters into one, it is none the less a contract, and, on account of the public character of the business in which it is engaged, the court has authority to determine whether the rules and regulations adopted by it in reference to the conduct of its business as a carrier of passengers are reasonable and proper. If what is contained in the statements on the transfer slip were embodied in an express contract, based upon a sufficient consideration, it may be that the courts would not interfere.

3. It is said that there is a condition on the transfer that, if there is any controversy in reference to the same, the holder will pay fare and call at the company's office for correction. There was a similar condition on the transfer involved in the case decided by the Supreme Court of Tennessee, above referred to. In reference to this stipulation the court said: "This condition is unreasonable, in that it makes the conductor, for the time, the sole judge of the sufficiency of the ticket, and requires the passenger to pay additional fare, though his ticket may be refused without sufficient cause, in that it requires the wronged passenger, who so pays, to apply for refund at the office of the company, which must be remote from the houses and business places of most passengers, and then limits the amount to be received by such person to that wrongfully enacted. It puts all of the burden of the 'controversy' upon the wronged passenger, and none upon the wrongdoing company, and thereby makes the just suffer for the unjust." We thoroughly concur in this view. Counsel in their argument say that the decision of the Supreme Court of Tennessee which we have followed was based upon a statute of that state requiring a street railway company to issue transfers. There is no reference to a statute in the opinion of the court. In addition to this, none of the reasoning of the learned judge

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who delivered the opinion is based upon any statute, and the questions seemed to have been solved merely by the application of general rules of law.

4. The averments of the petition that the conductor of the second car refused to recognize the transfer and demanded payment of a second fare, and threatened to eject the plaintiff, in an insulting manner, were not sustained by the proof. The evidence, however, does show that he refused to accept the transfer, and that he demanded a second fare, and that he told the plaintiff that if she did not pay the second fare he would be compelled to eject her from the car. But the plaintiff testified that he acted in a gentlemanly manner, and that there was nothing insulting, either in his words or in his conduct, other than such an insult as may arise from a simple threat to eject. It is a case, therefore, where the conductor has simply complied with what he understood to be the rules and regulations of the company by which he was employed. In complying with these rules, although he might have had the manner of a perfect gentleman, and used language which would be proper in the most polite society, still, if the plaintiff had a right to ride upon the car and was threatened with expulsion, no matter in what words, it was a breach of the duty which the company owed her as a passenger, and gave her a right of action against the company. A jury would have been compelled to find that the explanation made by the plaintiff of the mistake in the transfer was reasonable, and, although the conductor was placed in an embarrassing position, under the law he was compelled to choose between two alternatives, and if he made a mistake, and used a threat to expel a passenger who had a right to ride on the car, the company would be liable, without reference to the manner in which he made the threat and his good faith in the matter.

5. There are some decisions which hold that the damages recoverable for an expulsion resulting from the wrongful refusal to accept a transfer, the mistake being due to the conductor of the initial car, are compensatory only. *Pine v. St. Paul City Ry. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347; *Eddy v. Syracuse Rap. Trans. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645. In Ohio it was held by a circuit court that the passenger's recovery was limited to the additional fare paid, when there was no aggravating circumstances. *Carr v. Toledo Trac. Co.*, 9 Ohio Cir. Ct. R. 281. But we think the decision by the Supreme Court of Pennsylvania in the case of *Laird v. Pittsburg Trac. Co.*, 166 Pa. 4, 31 Atl. 51, takes the better view of the matter. It was there held that in such a case the damages are not limited merely to the amount sufficient to compensate the plaintiff for the trouble and delay caused by the conductor of the company and the expense necessary to complete his journey, but he is entitled to substantial damages, as for an inexcusable trespass. In that case there was a request to instruct the jury that the damages to be recovered were simply those resulting from the trouble and inconvenience caused by the expulsion

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from the car. In commenting on the propriety of this instruction, Sterrett, C. J., well says: "To sanction such a measure of damages as is suggested in this point would tend to encourage rather than prevent the commission of indignities to which no well-behaved passenger in a public conveyance should be subjected."

6. The charge of the court was in effect an instruction that the plaintiff was entitled to recover. There would have been no error in instructing the jury in terms to this effect. Under the undisputed facts a recovery was demanded, and the only question to be determined was the amount of the verdict. In the instructions on the subject of damages the court charged: "The worldly circumstances of the parties and all the attendant facts are to be weighed." This charge was assigned as error, for the reason that there was no evidence to authorize it. There was no evidence as to the worldly circumstances of the parties. While the verdict is not large, and possibly a larger verdict, as a recovery of general damages, would be permitted to stand, still the question of what should be assessed as general damages was a matter for determination by the jury, and we cannot undertake to say that the jury was not misled by the erroneous charge into giving a larger amount than they in their judgment would have thought sufficient in the absence of such an instruction.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

ST. LOUIS & S. W. R. CO. OF TEXAS v. WHITE.

(Supreme Court of Texas, Dec. 4, 1905. On Rehearing, Dec. 21, 1905.)

[89 S. W. Rep. 746.]

Carriers—Station Agents—Authority—Representation as to Best Route.*—A railroad station agent, with authority to sell tickets over its line, has authority to furnish information to persons desiring to purchase tickets over the road he represents as to the best route for the intending purchaser to travel to reach his destination, rendering the railroad company liable for all damages proximately caused to such purchaser by the agent's misdirection.

Same—Damages—Extent of Liability.†—Plaintiff, desiring to make a journey with his wife, who was in delicate health, inquired of de-

*For the authorities in this series on the subject of the implied authority of a carrier's freight or ticket agents, see foot-notes appended to *Gulf, etc., Ry. Co. v. Jackson & Edwards* (Tex.), 19 R. R. R. 125, 42 Am. & Eng. R. Cas., N. S., 125.

For the authorities in this series on the subject of the responsibility of the carrier for the mistakes or negligence of its ticket agents, see foot-notes appended to *Geer v. Michigan Cent. R. Co.* (Mich.), 19 R. R. R. 781, 42 Am. & Eng. R. Cas., N. S., 781; *Cincinnati, etc., Ry. Co. v. Harris* (Tenn.), 19 R. R. R. 762, 42 Am. & Eng. R. Cas., N. S., 762; foot-notes appended to *Latour v. Southern Ry.* (S. Car.), 18 R. R. R. 379, 41 Am. & Eng. R. Cas., N. S., 379.

†For the authorities in this series on the subject of the damages

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defendant's ticket agent as to the best route, and was directed to take the route they traveled, for which the agent sold plaintiff tickets. They were out four days and three nights and made four changes, during one of which the wife was injured while alighting from a car. There was another route over which he could have gone and reached the destination in much less time and with less changes. Held, that plaintiff was entitled to recover against defendant compensation for any injury resulting to his wife from any negligence of defendant on its own line, and on account of her having to make a greater number of changes of trains than she would have otherwise been compelled to have made, and for any injury she sustained in necessarily being on the way longer than if she had taken the other route, excluding any delays that may have occurred from a failure of the trains over other railroads to be run on schedule time.

Same—Connecting Carriers—Delay.‡—Where, in a suit for injuries to a passenger, plaintiff claimed that by the misrepresentation as to the best route made by defendant's agent plaintiff and his family were caused to go in a wrong direction on defendant's railroad, which necessarily caused them delay and inconvenience, to the injury of his wife, defendant company was not liable for delays on other connecting roads over which plaintiff traveled to his destination, in the absence of proof that such delays were not caused by failure of such connecting carriers to run their trains on time or by other negligence on their part.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. F. White against the St. Louis & Southwestern Railroad Company of Texas. From a judgment in favor of plaintiff, affirmed by the Court of Civil Appeals (86 S. W. 71), defendant brings error. Reversed.

Glass, Estes & King, for plaintiff in error.

H. W. Vaughan, for defendant in error.

BROWN, J. In February, 1902, J. F. White, with his wife and two children, resided in Bowie county, Tex., near Maude, a station on the railroad of the plaintiff in error. There was no other railroad at that place. Desiring to remove with his family to Jasper county, Tex., near Kirbyville, White applied to the agent of the plaintiff in error for information as to the best route, telling him at the time that his wife was pregnant and in delicate health, and he wished that way which would consume the least time and require the fewest number of changes. The agent told White that the best route was by Tyler and Lufkin. The plaintiff in error operated the road from Maude to Lufkin. The agent told White that he would have to change cars at Tyler, but that it would only be to go from one train to the other; that he would make connection at Tyler, and reach Lufkin in the evening of the first day, where he would have

recoverable for failure to carry, or delay in carrying, a passenger, see foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; foot-notes appended to *Elliott v. Southern Pac. Co.* (Cal.), 18 R. R. R. 52, 41 Am. & Eng. R. Cas., N. S., 52.

‡See foot-notes appended to *Pennsylvania Co. v. Loftis* (Ohio), 15 R. R. R. 850, 38 Am. & Eng. R. Cas., N. S., 850.

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to remain overnight, but would get a train the next morning which would take him direct to Kirbyville. From Maude to Lufkin is about 200 miles, and from Maude to Texarkana is 18 miles. Going by Lufkin the plaintiff in error carried White and family about 180 miles more than it would if they had been routed by Texarkana. The agent did not tell White of a route that he might have gone by way of Texarkana over the plaintiff in error's road and thence over the Texarkana & Ft. Smith and Kansas City Southern Railway to Beaumont, where he would take the Sante Fe direct to Kirbyville. By the latter route he would have left home in the morning at 5 o'clock, arriving at Beaumont that night, where he would have stopped over for the night, going on the next day and arriving at Kirbyville near noon of the second day. On the day that plaintiff was leaving Bowie county for his new home, he called upon the agent of the railroad company at Maude again, and, before purchasing a ticket, asked him if he was sure that the route by Tyler and Lufkin was the best route, repeating to him the reasons which caused him to be anxious to secure the shortest and best way. The agent again assured him that the route that he had suggested was the best, and under this assurance the plaintiff purchased tickets for himself and his wife from Maude to Lufkin and took the train of the plaintiff in error at Maude by which he was carried to Tyler; but the train was late, and when they arrived there the train for Lufkin had departed and plaintiff and his wife were compelled to remain in Tyler all night and until the next day about 2 o'clock, at which time he got a train from Tyler to Lufkin, and arrived at the latter place after dark, about 7:15 p. m. Remaining over at Lufkin until about 4 o'clock a. m. of the next day, plaintiff with his family got a train on the Houston, East & West Texas road to Cleveland, and, arriving there at 10 o'clock a. m. they had to remain over until about 9 o'clock p. m., at which time they took a train from Cleveland to Silsbee Junction on the Santa Fe road, where they arrived at about 2 o'clock a. m. and remained there until about 7 o'clock in the morning, when they boarded the Santa Fe train which ran from Beaumont to Kirbyville, reaching the latter place near noon. Plaintiff and family were out four days and three nights and made four changes, whereas, if they had gone by Texarkana, there would have been two changes, and they would have been one night and one day and a half on the way. On the way from Tyler to Lufkin the cars in which the plaintiff and his wife were riding were not heated, but were, as expressed by the witness, very cool, and Mrs. White complained of being cool. On this trip she contracted a cold from which she afterwards suffered. On arriving at Lufkin the plaintiff and his wife had to disembark in the night, there being no lights at the depot, and they could not see where to step in getting off the car. Mr. White had the two children in his arms, was carrying a grip, and could not assist his wife in alighting. There was no stool on which to step in getting down from the steps of the cars,

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and no conductor nor brakeman at the place to assist Mrs. White, so that in alighting she had to make a long step down, and in doing so she was injured, which she felt at the time, and of which she then complained. Mrs. White suffered from this injury from that time on until she arrived at her father's house and subsequently. Mrs. White's father and mother, who lived in the country four miles from Kirbyville, came with a wagon to meet them and carried the family out to the country home. As soon as she arrived there Mrs. White went to bed. She was suffering from the injury received at Lufkin, and from the cold she had contracted. She was in bed seven weeks, during which time the child was born dead. Mrs. White continued to suffer, and has since then suffered from falling of the womb, which she never had before. She still suffers from that trouble. She had been before this trip a strong and healthy woman, able to do her housework and attend to all the business of a housewife. Since that time she has not been as strong as she was before her injury.

As the honorable Court of Civil Appeals did not file any findings of fact, we have been under the necessity of examining the statement of facts and making the foregoing statement for the purpose of determining whether there was error in the rulings of the court as complained of. The statement presents the conclusions most favorable to the plaintiff, under the facts proved, which is the view that this court must take of the evidence. The application for writ of error presents the following propositions: First. That the plaintiff in error should not be held liable for the misrepresentations made by its agent Smith to White concerning the route which the latter should take to Kirbyville. Second. That the trial court erred in the third paragraph of its charge to the jury, because it authorized the jury to assess damages in favor of White against this railroad company for delays, inconveniences, and injuries that occurred upon other lines of railroad through the failure of other railroad companies to run their trains on schedule time.

When a railroad company authorizes an agent to sell tickets over its line, such agent has authority, and it is his duty, upon application made to him, to furnish information to persons desiring to purchase tickets over the road he represents as to the proper trains upon which to travel, and whether such trains will stop at the station to which the ticket is sold, and other like information regarding the use of the ticket. *Burnham v. G. T. Ry. Co.*, 63 Me. 302, 18 Am. Rep. 220; *Central Ry. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315; *Alabama G. So. Ry. Co. v. Heddleston*, 82 Ala. 218, 3 South. 53; *Lake Shore & M. S. Ry. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157; *G. C. & S. F. Ry. Co. v. Moorman* (Tex. Civ. App.) 46 S. W. 662; *T. & P. Ry. Co. v. Armstrong*, 93 Tex. 31, 51 S. W. 835; *Id.* (Tex. Civ. App.) 53 S. W. 1119. If at the time he sold the tickets the agent represented to White that the best route to Kirbyville was by way of Tyler and Lufkin over the road of this company,

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when in fact there was a better and more convenient route over the road of the said company by Texarkana, then the plaintiff in error should be held responsible for all damages which were proximately caused by the misdirection of the agent. It was the duty of White to inform himself as to the best route to be taken by him from Maude to Kirbyville, which suggests the reciprocal obligation on part of the railroad company to furnish the information, and the circumstances would naturally suggest to the passenger to inquire of the person who sold the ticket to him.

In the case of *Burnham v. Railway Company*, above cited, the court, in discussing the duty of the purchaser of a ticket to inform himself as to the running of trains to his destination, said: "To whom shall he go to obtain it? To whom can he go, but to the person appointed by the company for the purpose of giving such information, and selling the proper ticket?" The court held in that case that the statements of the ticket agent bound his principal, although the company claimed that he was not authorized to make such statement. In *Lake Shore & Mich. S. Ry. Co. v. Pierce*, above cited, in discussing the right of the purchaser to rely upon the statements of the agent, the court said: "It is the business of the agents who contract with passengers for their fare to have the means of directing them safely, and such an agent is universally resorted to for such information by strangers who have occasion to obtain such guidance. When, as in this case, the attention of the agent was distinctly called to the desire of Pierce to know what trains he could rely on to bring him to Batavia in season for his purposes, we think he had a right to rely on the correctness of the information received, and to act on it at least until informed to the contrary." In *Railway Company v. Moorman*, before cited, the facts in brief were that, at the station of Moody on the line of the Gulf, Colorado & Santa Fe Railroad, the agent habitually permitted the porter, Brown, to sell tickets in the office for such length of time that the court said the railroad company was charged with notice of the fact. A passenger applied for a ticket to Temple and return, and inquired if he could return on the night train on that ticket. Brown sold the ticket and told the purchaser he could go on the ticket to Temple and return on the night train, which would stop and let him off at Moody. The passenger went from Moody to Temple, and, on his return trip on the night train, the conductor refused to stop at Moody to permit him to get off and carried him beyond his destination to McGregor. The Court of Civil Appeals, speaking through Chief Justice Fisher, held that the railroad company was bound by the statements of the person who sold the ticket, and affirmed a judgment for damages against the railroad company.

In *Railway Company v. Armstrong*, cited above, the facts were very similar to this case. We will not recite the facts, but it is sufficient to state that the agent of the Texas & Pacific Railroad Company at Paris, Tex., upon application of a man to buy

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a ticket for his sister to a station named Tucker in the Indian Territory, undertook by examination of the maps to determine what was the best route for the passenger to take in order to reach Tucker. The agent sold a ticket from Paris over that road to Whitesboro, thence over the Missouri, Kansas & Texas Railroad to Henrietta, thence by the Ft. Worth & Denver City Railroad to a station called Newland in Hall county, Tex. The proper route for the passenger to go was the same as far as Gainesville, thence north on the Gulf, Colorado & Santa Fe Railroad and Atchison, Topeka & Santa Fe Railroad to Winfield, Kan., and thence to Tucker by the last road. Mrs. Armstrong with her children went as far as Henrietta, and, discovering that she was on the wrong road, stopped and was compelled to remain there for several days to get her ticket corrected, during which time she was greatly inconvenienced and suffered mental anguish. The case as presented in 93 Tex., 51 S. W., above cited, does not raise the question that we are now discussing. It was submitted to this court on certified question, but we refer to it for the facts. The railroad company claimed, as in this case, that the agent had no authority to direct the passenger in the selection of the route, but the Court of Civil Appeals for the Third District decided the case adversely to that claim, holding that the railroad company was liable for the misstatements and misrepresentations of its agent in selling the ticket. The case is reported in 53 S. W. 1119. The railroad company made application to this court for a writ of error, upon the ground of its nonliability for the statements and misrepresentations of its agent, which application was refused. In that case the agent sold the ticket over the connecting lines, which distinguishes that from this case; but that case is authority for holding the railroad company liable for misrepresentations of its agent as to its own line.

Assuming that the facts stated are true, we hold that White is entitled to recover from the railroad company compensation for any injury that may have resulted to his wife from any negligence of defendant on its own line, and for any injury she may have suffered on account of having to make a greater number of changes of trains than would have been required to be made if she had gone by Texarkana; also for any injury that Mrs. White sustained from being necessarily on the way longer than she would have been if she had gone the Texarkana route, excluding any delay which may have occurred from a failure of the trains over other railroads to be run on their schedule time.

In the third paragraph of the charge the trial court grouped and submitted to the jury, to be determined by them, the facts claimed by the plaintiff to have been established by the evidence, and charged the jury that, if they found the facts so grouped to be true, "and if you further believe from the evidence that the plaintiff's wife, Mrs. E. E. White, was injured, and

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that her injuries were directly caused by reason of the fact that she made the trip over the route by way of Tyler and Lufkin, and that she would not have received such injuries if she had gone the route by way of Texarkana, then you will find for the plaintiff on this particular charge of negligence." The terms of the charge embrace all of the delays, inconveniences, and injuries which occurred to Mrs. White between Lufkin and Kirbyville, without regard to the negligence of those carriers which transported her between those points. The effect of the charge is to make the plaintiff in error responsible for whatever occurred upon those roads the same as if they had been operated by this company. The plaintiff's cause of action rested upon the proposition that, by the misrepresentations of the agent at Maude, plaintiff and his family were caused to go in a wrong direction on the railroad of the plaintiff in error, which placed them in a position that necessarily caused them delays and inconvenience to the detriment of his wife; and, to hold the St. Louis & Southwestern Railroad Company liable for delays on other roads, the plaintiff must prove that such delays were not caused by failure of such other roads to run their trains on time nor by other negligence of said railroad companies.

It was error to give the charge complained of, for which the judgments of the district court and Court of Civil Appeals are reversed, and the cause is remanded.

On Motion for Rehearing.

Counsel for the railroad company suggest that the opinion in this case is susceptible of the construction that this court holds that a ticket agent of a railroad company is required to give information concerning the route to be taken by a passenger beyond the line of the road for which he is agent. We think the opinion is not fairly susceptible of that interpretation; but, to avoid any misunderstanding, we will state that the authoritative scope of the opinion is confined to the conclusion that it is within the scope of the authority of one who sells tickets for a railroad company to give information to persons purchasing tickets concerning the route to be traveled in using the ticket, and, when an agent undertakes to give such information, his principal will be responsible if he should mislead the passenger to his injury. The question of liability of a railroad company for failure of its agent to give such information on request is not passed upon. It was not in the case.

The motion for rehearing is overruled.

SOUTHERN PAC. CO. *v.* CAVIN.

(Circuit Court of Appeals, Ninth Circuit, March 19, 1906.)

[144 Fed. Rep. 348.]

Courts—Federal Courts—Rules of Decision.—In an action by a passenger, for injuries sustained by the alleged negligence of a carrier, the Circuit Court of Appeals is governed by the law as declared by the United States Supreme Court with reference to the measure of care required of the carrier.

Carriers—Injuries to Passengers—Burden of Proof—Res Ipsa Loquitur.*—In an action against a carrier for injuries to a passenger, the happening of the injurious accident establishes a prima facie case of negligence on the part of the carrier and the passenger being in the exercise of due care, the burden rests on the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight.

Damages—Instructions.—In an action against a carrier for injuries to a passenger, an instruction that if plaintiff received the injuries complained of by reason of defendant's negligence alleged, and at the time of such injury plaintiff had been suffering from some disease, and the injuries hastened the development of the disease, and thereby, without plaintiff's fault, his present condition resulted from such injury, then he was entitled to recover such damages as the jury determined he had sustained from the injury, clearly limited plaintiff's recovery to the injuries he sustained by reason of defendant's negligence, and was therefore proper.

Writ of Error—Review—Damages—Excessiveness.—In an action in the federal courts for personal injuries, the excessiveness of the damages awarded can be reviewed only on a motion for a new trial in the trial court, and not on a writ of error.

Evidence—Newspapers.—Where, in an action for injuries to a passenger defendant claimed that the accident resulted from a cloud burst which was an act of God, and a witness who testified concerning the cloud burst stated that the editor of a newspaper had interviewed him concerning it, and had afterwards published an account of the interview, such proof did not authorize the introduction of the newspaper account in evidence.

Carriers—Who Are Passengers—Mail Clerks.†—A mail clerk while serving the United States on board a passenger train is to be regarded as a passenger.

*See foot-notes appended to *Graf v. West Jersey & S. R. Co.* (N. J.), 19 R. R. R. 796, 42 Am. & Eng. R. Cas., N. S., 796; *Kansas City, etc., R. Co. v. Nichols* (Miss.), 19 R. R. R. 330, 42 Am. & Eng. R. Cas., N. S., 330; *Firebaugh v. Seattle Elec. Co.* (Wash.), 19 R. R. R. 107, 42 Am. & Eng. R. Cas., N. S., 107; *Omaha St. Ry. Co. v. Boesen* (Neb.), 19 R. R. R. 100, 42 Am. & Eng. R. Cas., N. S., 100; *Louisville & N. R. Co. v. Board* (Ky.), 19 R. R. R. 51, 42 Am. & Eng. R. Cas., N. S., 51; foot-notes appended to *Tiborsky v. Chicago, etc., Ry. Co.* (Wis.), 18 R. R. R. 131, 41 Am. & Eng. R. Cas., N. S., 131; *Williams v. Spokane, etc., Ry. Co.* (Wash.), 18 R. R. R. 278, 41 Am. Eng. R. Cas., N. S., 278.

†For the authorities in this series on the question who are, and are not, passengers, see foot-note appended to *Conroy v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 384, 42 Am. & Eng. R. Cas., N. S., 384; *Robertson v. Boston & N. St. Ry. Co.* (Mass.), 19 R. R. R. 123, 42 Am. & Eng. R. Cas., N. S., 123; *Chicago Union Traction Co. v. O'Brien* (Ill.), 19 R. R. R. 95, 42 Am. & Eng. R. Cas., N. S., 95; *McDonald v. Central R. Co.* (N. J.), 19 R. R. R. 58, 42 Am. & Eng. R. Cas., N. S., 58; foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; *Illinois*

Southern Pac. Co. *v.* Cavin**Evidence—Examination of Experts—Reference to Authorities.†—**

Where, in an action for injuries to a passenger, a witness testified that he had been a life insurance agent for 11 or 12 years, was familiar with the standard life tables and that the American experience tables were the ones most commonly used in the United States, he was properly permitted to testify that according to those tables plaintiff's expectancy was 29.62 years.

In Error to the Circuit Court of the United States for the Northern District of California.

See 136 Fed. 592.

This action grew out of the same railroad accident that was under consideration in the case of *Southern Pacific Company v. Schuyler*, 135 Fed. 1015, 68 C. C. A. 409. James C. Cavin was, as was Schuyler, a mail clerk on board the train at the time of the accident, and received severe injuries in the wreck, for which he sued the railroad company for \$40,000 damages, securing a verdict and judgment in the court below for \$15,000. After the case was brought here, Cavin died. His widow was appointed administratrix of his estate, and as such was duly substituted as the defendant in error.

In his complaint Cavin alleged that at the time he received the injuries in question he was a young, able-bodied, well-preserved, and healthy man, was then earning \$1,400 a year, and that his then life expectancy and period of such earning was 30 years. He alleged that by the derailment of the train on which he was at the time working as a United States mail clerk, and which he charged was caused by various alleged negligent acts and omissions of the railroad company, he was instantly rendered unconscious, and that these were his injuries: "His eyelid cut and the sight permanently injured; received a severe cut under the chin; left arm cut to the wrist from a point half way between the elbow and wrist; received injuries on the back, and to the spinal column, causing a partial paralysis of the lower limbs; received internal injuries, seriously and permanently, injuriously affecting the lungs; by said injuries plaintiff has suffered great physical pain and mental anguish, without any fault or neglect on his part, but solely through the negligence and want of care of said defendant."

The answer of the defendant company to the complaint denied all of its allegations of negligence, and the extent of the plaintiff's injuries, and set up in defense that the accident in which Cavin was injured was the result of an unprecedented flood, and that

Cent. R. Co. v. Proctor (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

†For the authorities in this series on the subject of the admissibility of life tables in evidence in personal injury cases, see foot-notes appended to *Illinois Cent. R. Co. v. Cane's Adm'x* (Ky.), 19 R. R. R. 823, 42 Am. & Eng. R. Cas., N. S., 823; *McGregor v. Rhode Island Co.* (R. I.), 19 R. R. R. 510, 42 Am. & Eng. R. Cas., N. S., 510; foot-notes appended to *Illinois Cent. R. Co. v. Houchins* (Ky.), 18 R. R. R. 850, 41 Am. & Eng. R. Cas., N. S., 850.

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in all particulars it had exercised the greatest care, prudence, and foresight.

The evidence in the case in respect to the cause and circumstances of the accident, is substantially the same as it was in the Schulyer Case, where they are detailed as follows: "The defendant in error was a mail clerk on a railroad train which was ditched near Mill City by the washing out of a fill or embankment. The embankment was about 150 feet long, 24 feet high, and 16 feet wide at the roadbed, and sloped gradually downward and away. It was constructed at a point where a ravine or dry wash comes down to the railroad. A culvert three feet by four feet was constructed through the embankment to carry off the water which came down the ravine. Shortly before the accident, a volume of water gathered at the embankment in excess of the capacity of the culvert. The fill was undermined by the water, and gave way beneath the weight of the train. The complaint charged the plaintiff in error with negligence in failing to exercise proper care in operating its train, and in failing to construct and keep its roadbed in proper condition and repair. The evidence was that the ravine, spoken of in the testimony as 'Willow Creek,' across which the embankment extended, was ordinarily dry, but that at times it carried large quantities of water which came to it from a watershed of considerable area. The culvert had been sufficient, however, for many years, to carry away the water and prevent injury to the embankment. The train was wrecked about 6 o'clock in the morning. A culvert about three miles west of the wreck, having a capacity three times that of the culvert at the place of the wreck, was found to be washed out at about 8 p. m. on the day before, and thereby the train on which the defendant in error was carried had been laid up for some six hours immediately before the wreck. No inquiry was made by the train crew, the wrecking crew, or any one as to the condition of the culvert at the place of the wreck. The water was running in the ravine there at 1:30, some 15 hours before the wreck, and was rising rapidly in the creek during all of that time. On the afternoon of the 16th, ditches around Mill City, which is two miles from the place of the wreck, were running full of water. The temperature had risen, a warm wind was blowing, rain was falling, the snow was melting. There was a Japanese track walker, whose duty it was to patrol the track, where the wreck occurred, from 1:30 p. m. to 6 p. m. of the 16th. He was not produced as a witness. There was evidence that the plaintiff in error had made efforts to find him, but had been unable to discover him at the time of the trial of the cause, which was some two years after the wreck occurred. It was shown that he was at Mill City for about five months after the date of the wreck, and that within less than three months after the wreck an action had been commenced against the plaintiff in error to recover damages for the death of a passenger who had been killed in the wreck. About five

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hours prior to the accident a heavily loaded repair train passed over the fill without difficulty, but the crew could not see down the embankment more than five feet, and did not see the water which was dammed up. There was evidence of a cloud-burst, which lasted about 15 minutes, on the morning of the 16th, at a point about 25 miles from the place of the wreck. It was the contention of the plaintiff in error that the accident was caused by an unforeseen and unprecedented accumulation of water resulting from an act of God, and that it had used due diligence in constructing the embankment and in patrolling its track."

P. F. Dunne and Frank McGowan, for plaintiff in error.

Houx & Barrett and James G. Maguire, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

Ross, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal points made on behalf of the plaintiff in error relate to the giving and the refusal to give, by the court below, certain instructions to the jury. The one most urgently insisted on is the alleged error of the court in instructing the jury, as it did, that "the derailment of the car in which plaintiff was riding at the time of the wreck in question, is prima facie evidence of defendant's negligence, and the plaintiff being himself in the exercise of due care, the burden is upon defendant to prove that it was not guilty of negligence, and that its whole duty was performed to guard against and prevent derailment; and the burden is upon it to prove that such derailment was unavoidable by the exercise of the foresight, vigilance, and diligence of a very cautious, prudent, and vigilant person." In the same connection the plaintiff in error requested, and the court below refused to give to the jury, this instruction:

"In cases like the present a prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and the injury was caused by the manner in which defendant used or directed the instrumentality under its control. This fact, when established by evidence, but makes out a presumptive case on the issue of negligence, and is only satisfactory if uncontradicted. It is not intended by this presumption, nor this instruction, to shift the burden of proof of the whole case to defendant. It means that upon a showing of these facts, plaintiff has established negligence on defendant's part, and defendant must meet this proof by showing that the injury was without any negligence on its part."

The action of the court in each particular was duly excepted to by the plaintiff in error, and is duly assigned for error.

It is insisted by counsel that the instruction given by the court imposed upon the plaintiff in error a greater burden than the law authorizes, in that it cast upon the plaintiff in error the

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burden of proving that it was not guilty of negligence "with reference to the whole case, and not with reference to the particular act of derailment," and that it does not properly distinguish between the burden of proof and the weight of evidence. Counsel rely, in support of their contention, particularly upon the cases of *Patterson v. S. F. & S. M. Elec. Ry. Co.* (Cal. Sup.) 81 Pac. 531, and *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871. In the latter case the court was considering the general rule prevailing in ordinary civil actions. Whether there is any conflict or inconsistency between the *Patterson* Case and the subsequent one in the same court of *Cody v. Market Street Ry. Co.* (Cal. Sup.) 82 Pac. 666, and the prior cases of *Green v. Pacific Lumber Co.*, 130 Cal. 435, 440, 62 Pac. 747; *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 70 Pac. 169; and *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, we need not consider; for whatever the rule may be in the state courts, we are, in cases like the present, to be governed and controlled by the law as declared by the Supreme Court of the United States. "Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115, and *Railroad Company v. Pollard*, 22 Wall. 341, 22 L. Ed. 877," said that court in *Gleason v. Virginia Midland Ry. Co.*, 140 U. S. 435, 443, 11 Sup. Ct. 859, 862, 35 L. Ed. 458:

"It has been settled law in this court that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance; and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270."

The reason for the rule is that in the very nature of things the passenger rarely, if ever, can know the cause or causes of the injury, while the carrier has the means at its command to show the facts, and, if it is free from blame, to exonerate itself. *Whitney v. Railway Co.*, 102 Fed. 850, 852, 43 C. C. A. 19, 50 L. R. A. 615; *Denver & R. G. Ry. Co. v. Fotheringham* (Colo. App.) 68 Pac. 978.

The second of the principal contentions on the part of the plaintiff in error is, we think, equally without merit. It grows out of the following portion of the charge of the court:

"You are further instructed that if you find from the evidence that the plaintiff received the injuries complained of by reason of the defendant's negligence alleged in the complaint, and that at the time of the reception of such injuries the plaintiff had been suffering from some disease, and further find that such injuries hastened the development of the disease, and that thereby, without the fault of the plaintiff, his present condition, whatever you may find that to be, has resulted from such injury,

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then I instruct you that the plaintiff is entitled to recover such damages as you may determine he has sustained from the injury."

By this instruction the jury was clearly limited in the awarding of damages, to such injuries as they should find the plaintiff sustained by reason of the defendant's negligence; which is in accordance with the rule laid down by Sutherland in his work on Damages (3d Ed.) in section 1244, and the other authorities cited by counsel for the plaintiff in error. The contention that the defendant was taken by surprise by the allegation contained in the complaint, to the effect that Cavin was, at the time of the accident a well and able-bodied man, is negatived by the defendant's cross-examination of the plaintiff Cavin, and by its examination of the witness W. B. Coffey. We have examined the charge of the court below with care, and are of opinion that it very clearly and fairly gave the jury the law applicable to the case, and left the facts of it for their determination.

What was said by the Supreme Court in the case of Railroad Co. v. Winter's Adm'r, 143 U. S. 60, 75, 12 Sup. Ct. 356, 361, 36 L. Ed. 71, answers two of the other points of the plaintiff in error:

"Whether the verdict was excessive, is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here. As stated by us in *Ætna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 Sup. 720, 35 L. Ed. 371: 'It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.' "

That the court below did not err in sustaining the objection to the admission in evidence of the article published in the *Love-locks Tribune*, March 2, 1901, was held by this court in the case of *Southern Pacific Co. v. Schuyler*, 135 Fed. 1015, 68 C. C. A. 409, and that Cavin, while serving as a United States mail clerk on board the defendant's train, is to be regarded as a passenger, was held by this court when the present case was formerly under consideration. *Cavin v. Southern Pacific Co.* (C. C. A.) 136 Fed. 592. But one other point made by counsel for the plaintiff in error need, we think, be specially mentioned, although we have given to all of them careful consideration, and that relates to the testimony of the witness Meals, who, having testified that he was a life insurance agent, and had been such for 11 or 12 years, and was familiar with the standard life table used by life insurance companies, and that the American experience tables

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are the ones most commonly used in this country, was permitted, against the objection of the plaintiff in error, to testify that, according to those tables, Cavin's life expectancy was 29.62 years. In this there was no error. *Shover v. Wyrick* (Ind. App.) 30 N. E. 207; *Chicago, I. & L. Ry. Co. v. Neff* (Ind. App.) 56 N. E. 927.

The judgment is affirmed.

TILDEN v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, March 8, 1906.)

[63 Atl. Rep. 675.]

Carriers—Injuries to Passengers—Setting Down Passenger.*—In an action for injuries to a passenger, evidence that a depression into which she stepped on alighting from the car had been there for a long time, that at the time of the accident grading was being done to level up the ground adjacent to the rails near by, that the defendant had established a white pole as a stopping place near the point of the accident, and that the depression was hid from view as she sat in the car, was sufficient to import notice to the defendant of the unsafe condition of the ground and to make out a prima facie case of its negligence.

Same—Invitation to Passenger to Alight.†—The stopping of a street car and call of the conductor "Butler Hospital," was a sufficient invitation to a passenger to alight and to justify her in believing that she could alight with safety.

Trespass on the case of Anna I. Tilden against the Rhode Island Company for negligence. Heard on petition of plaintiff for a new trial. Granted.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Gardner, Pirce & Thornley and *William W. Moss*, for plaintiff.
Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and *Alonzo R. Williams*, for defendant.

*For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises from the fact that a passenger is injured, see preceding case, and foot-notes.

For the authorities in this series on the subject of the duties and liabilities of a carrier of passengers with respect to the safety of stations, platforms and other stopping places, see foot-notes appended to *Murnahan v. Cincinnati, etc., Ry. Co.* (Ky.), 17 R. R. R. 667, 40 Am. & Eng. R. Cas., N. S., 667; foot-notes appended to *McCormick v. Detroit, etc., Ry. Co.* (Mich.), 17 R. R. R. 516, 40 Am. & Eng. R. Cas., N. S., 516; *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; foot-notes appended to *West v. St. Louis S. W. Ry. Co.* (Mo.), 15 R. R. R. 855, 38 Am. & Eng. R. Cas., N. S., 855.

†For the authorities in this series on the question, what constitutes an invitation to a passenger to alight from a car or tram, see foot-notes appended to *Mearns v. Central R. R.* (C. C. A.), 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97.

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PARKHURST, J. We think the court below erred in directing a verdict for the defendant at the close of the plaintiff's testimony. If the plaintiff had failed to present any evidence showing negligence on the part of the defendant, it would have been proper for the court to have directed a nonsuit; or if the plaintiff had, by her own testimony, showed a state of facts (such as contributory negligence) which would have precluded her recovery in any event, it would have been proper for the court to direct a verdict for the defendant at that time.

1. In this case, however, the record discloses evidence tending to show that, at the point where the defendant stopped its car for the purpose of allowing the plaintiff to alight, there was a depression in the ground which must have been there for a long time, probably ever since the rails were laid, as the depression was grown up with grass and brush and partly obscured thereby; that at the time of the accident grading was being done, to level up the ground adjacent to the rails near this point; that the defendant had established a "white pole" as a stopping place quite near the point of the accident, so near, as plaintiff says, that she thinks she could have reached it with her hand, from the car, when the car was stopped where she got off; and that the depression was by the side of and so near the rail that the running-board hid it from her view as she sat in the car; and that she stepped into this depression when she alighted, and fell and was injured by reason thereof. The evidence, as above recited, was sufficient to import notice to the defendant of the unsafe condition of the ground at the point of alighting, if such was the fact, and made out a prima facie case which should have been submitted to the jury.

2. It is as much the duty of a carrier of passengers to see that the place where it stops to permit passengers to alight is such that passengers may alight safely as it is to carry its passengers safely while they are on the cars; or, in case it becomes necessary to invite passengers to alight at a point where there is danger of injury, to give such warning or such assistance, or both, if necessary, as to prevent injury. The stopping of the car at this point and the call of the conductor, "Butler Hospital," was a sufficient invitation to the plaintiff to alight there, and she was justified in believing that she could alight with safety.

The plaintiff's exception is sustained, the verdict of the jury is set aside, a new trial is granted, and the case is remanded to the superior court for further proceedings.

GRAHAM v. CHICAGO & N. W. Ry. Co.

(Supreme Court of Iowa, May 18, 1906.)

[107 N. W. Rep. 595.]

Carriers—Injuries to Trespassers—Care Required.*—Where one who intended to take a train boarded it while in motion and was obliged to ride on the steps, owing to the vestibule doors being locked, being a trespasser, the operatives of the train owed him no duty until his position of danger was made known to them, and their duty then was only to act with reasonable promptness in adopting such means as were available and appropriate to accomplish his rescue.

Same—Action for Injuries—Evidence.—In an action for the death of a trespasser owing to his being struck by a portion of a viaduct structure while riding on the steps of a passenger car, evidence considered, and held to show that the operatives of the train had no knowledge of the trespasser's dangerous condition prior to his death.

Same.—Where, in an action against a railroad for the death of a trespasser killed while riding on the steps of a passenger car by being struck by a portion of a viaduct structure, it appeared that the use of the emergency brake is dangerous to passengers, and that after the operatives were informed of the trespasser's presence they took steps to admit him to the car, and that it was as expeditious a means of rescue as to stop the train by means of the emergency brake, the operatives were not negligent in failing to use the brakes.

Appeal from District Court, Monroe County; F. W. Eichelberger, Judge.

Action to recover damages for a personal injury resulting in the death of the plaintiff's intestate, Roy Graham. Graham was a young man nearly 21 years of age, and his home was in the city of Ottumwa, this state. The accident in which he lost his life occurred September 17, 1901, and in the city of Chicago, Ill. Stated generally, the circumstances of the accident were as follows: In company with another young man named Hooyer, Graham had gone to Chicago for a visit. On the afternoon of the day of the accident they met a mutual friend, a young man named Newgren, and all three planned an evening visit at De Kalb, 65 miles out of Chicago, and on the line of defendant's railway. They agreed upon taking the train known as the "Overland Limited," at Oakley Avenue Station. That train was a fast through train, which left the principal station in the city at 6:30 p. m., and was due at Oakley avenue at 6:38 p. m. From there it made no stops until De Kalb was reached. Upon approaching Oakley avenue from the south, the young men discovered the train already standing at the station. They were on the side opposite from the station building and platform, and as they came up the train commenced to move out. It appears that the train was vestibuled throughout, and as the start was

*For the authorities in this series on the question, who are, and are not, passengers, see second preceding case, and foot-notes.

For the authorities in this series on the subject of the care due from railroads to trespassers on their trains or cars, see foot-notes appended to Kansas City, etc., R. Co. v. Williford (Tenn.), 19 R. R. R. 549, 42 Am. & Eng. R. Cas., N. S., 549.

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made from the station all the vestibules were closed on the south side. When closed, the door of the vestibule sets in about six inches from the outer line of the car, and the lower edge is on a level with a trapdoor which, when let down over the steps, forms a continuation of the car platform. Graham ran to the moving train and caught on the front end of one of the cars by grasping the handholds or rods on each side of the vestibule door, and planting his feet on the lower step. He thus stood facing the vestibule door. As the rear end of the car came up the other boys caught on in like manner. Hooyer remained standing on the step facing the door, while Newgren found a footing between the vestibuled ends of the cars. After a time Hooyer succeeding in attracting attention from the inside of the car, and he and Newgren were rescued from their position. Upon going to the front end of the car it was discovered that Graham was missing. Shortly afterwards he was found by other parties lying dead beside the track about a mile west of Oakley avenue and near the west end of a viaduct crossing over Kedzie avenue. As no one saw the accident, the manner of its occurrence could not be told. It would seem certain, however, that he either lost his hold and fell against the viaduct structure, or was brushed off by such structure, as fresh blood was found at places thereon. The trial resulted in a verdict and judgment for plaintiff, and the defendant appeals. Reversed.

J. C. Mabry, Clark & McLaughlin, and James C. Davis, for appellant.

Chester W. Whitmore and N. E. Kendall, for appellee.

BISHOP, J. Plaintiff's action is grounded upon negligence of the defendant. One of such grounds is that, when advised by Hooyer and Newgren of the peril to which Graham was exposed, the train employees failed to take such prompt and effective means as were within their reach to accomplish his rescue, and as the case went to the jury such was the only ground of negligence submitted. The plaintiff, of course, is not in position to complain of this, and accordingly we shall have no occasion to make inquiry respecting any of the other ground alleged. By motion for a directed verdict at the close of all the evidence in the case, by request for instruction, and by motion for a new trial, defendant challenged the right of plaintiff to recover for that a case of actionable negligence had not been made out. In the motion for a directed verdict counsel for defendant state precisely the grounds of their contention, and they are as follows: First. The undisputed evidence shows that in boarding the train on the outside of the vestibule Graham acted not only in violation of the statutes of the state of Illinois, but without notice to, or knowledge on the part of, the defendant. He was therefore a trespasser and only entitled to rights as such. Second. The evidence fails to show that defendant's employees in charge of the train were notified of Graham's presence on the

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train prior to his injury. Third. That as soon as notified that Graham was riding on the outside the employees in charge of the train adopted the quickest and safest way to relieve him, by going to the vestibule where according to the information given them he was supposed to be riding.

1. That under the circumstances Graham was a trespasser, and acted in violation of law, is too clear for argument. The trial court so instructed the jury, and counsel for appellee do not take space to question the correctness of the instruction. Being a trespasser the defendant owed Graham no duty until his position of danger was made known to the employees in charge of the train, and then only to act with reasonable promptness in adopting such means as were available and appropriate to accomplish his rescue. *Masser v. Railway*, 68 Iowa 602, 27 N. W. 776; *Burg v. Railway*, 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419; *Baker v. Railway*, 95 Iowa, 163, 63 N. W. 667; *Earl v. Railway*, 109 Iowa 14, 79 N. W. 381, 77 Am. St. Rep. 516.

2. Confessedly the first information to the effect that Graham had boarded the train on the outside came to the train employees from Hooyer and Newgren after the latter had been admitted to the train; and, as we have seen, Graham fell or was brushed off at or near the Kedzie avenue viaduct. Of vital importance to plaintiff's case, therefore, is the location of the train with reference to the viaduct when such information was imparted. As we read the record, and we have gone over it with much care, there seems no reasonable grounds to conclude otherwise than at the time in question the train has passed the viaduct. This being true, there is no possible theory upon which the verdict and judgment can be upheld. We shall recite the evidence sufficiently in detail to make clear the situation. The boy Hooyer was the only witness for plaintiff who testified on the subject. He says that he was wholly unacquainted in the neighborhood, that he had never been there before, and has never been there since; that he did not know of the existence of Kedzie avenue or the viaduct. On direct examination he testified that he had since been informed as to the existence of the viaduct, and as to the distance thereof from Oakley avenue, and he gave it as his judgment that, at the time he was taken into the train, about one-third of the distance had been traveled. Being asked as to the rate of speed at which the train was running he answered that in his judgment it was about 15 miles an hour. On cross-examination, he answered that from the time he boarded the car he was standing face inward, hugging close to the vestibule door, and looking steadily through the window in such door; that he gave no attention whatever to land marks or objects that were being passed by the train; that he realized he was in a position of great peril, and was frightened, and that he kept rapping on the window until the brakeman came to his relief. On the subject of the speed of the train he answered that there was not very much acceleration as they went on. "Q. They kept increasing speed as you went on? A. I never took particu-

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lar notice. Q. They might have increased in speed, and you not noticed it? A. Well, they were not going very fast. Q. Are you a judge of the speed of railroad trains? A. No, sir. Q. You cannot tell a vestibule train when you see it? A. I do not know about that. Q. But you can judge as to the speed of a train? A. Well, about as near as anybody in my position, I guess." Now, for the defendant, Newgren testified in positive terms that the train had passed Kedzie avenue before he and Hooyer were taken in; that he was familiar with the viaduct, and knew when they passed it. "Yes, sir; I knew it. I had gone over it lots of times. You can tell by the sound. It is just like going over a bridge or river. When we went over, the railing of the subway just touched my back, just so I could feel it." The porter of the Pullman car who, with a brakeman named Wright, was present when Hooyer and Newgren were taken in, testified that they were then near the Kedzie viaduct; that he could not say whether it was just before or just after, but thinks it was just after they passed the viaduct. Two brakemen and the conductor of the train each testified that within his positive knowledge the train had proceeded some distance to the west of the viaduct before the presence of the boys on the train was discovered and they were taken in. Each of such witnesses testified further that at the time the train passed the viaduct the rate of speed at which it was running was from 25 to 30 miles an hour.

We have not overlooked the contention in argument of counsel for appellee to the effect that Hooyer and Newgren must have been taken into the train before the viaduct was reached because the space between the car and the girder of the viaduct was not sufficient to permit of the passage of a man standing on the car steps and clinging to the hand holds; that accordingly, and if the fact as to the location of the train was otherwise than as testified to by Hooyer, all three of the boys would have been brushed off when the viaduct was reached. The trouble with this contention arises out of the proof. The distance between the extreme south edge of the car step and the viaduct girder is shown to be 18 and a fraction inches, while the vestibule door is set in six inches from the outer line of the car. There was then a clearance of fully two feet. Hooyer was a slender boy, and he says he kept his body close up to the vestibule door, while Newgren, a much larger man, was partially in between the vestibule ends. Such being the facts, it was entirely possible for both to pass through without striking against the girder. Such, then, is the state of the evidence. As it seems to us, consideration thereof from any point of view must lead to the conclusion that the train had reached the viaduct, and Graham had fallen to his death before any warning of his peril had been given. It must be manifest that at best the estimate of Hooyer as to the distance the train had traveled can be taken for nothing more than sheer guesswork; a present guess as to a matter of fact respecting which he does not claim to have formed an opin-

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ion as of the time, and to which, as he declares, his attention had not been subsequently called until shortly before the trial, some three years after the happening of the accident. Being wholly unacquainted with his surroundings and giving not the slightest heed at the time to any object which could serve as a basis for computing distance with the eye, judgment on his part as to location was only possible by taking into account the speed of the train and estimating therefrom the distance run. Taking the circumstances as presented, it is inconceivable within our view that any judgment could have been formed by him on the subject. Here was an inexperienced boy 19 years of age in the precarious position of clinging to the outside of a rapidly moving train; he says he fully realized his peril and was frightened thereat; that his attention was centered upon maintaining his hold, and that his hope was to attract attention by continual rapping on the window and his rescue be thus brought about. It was not a time for judgment as to any matter not directly associated with his peril; it was not a time for thought even save as connected with his chances for relief. And the witness does not pretend otherwise. His judgment is not as of that time, but of time three years later when a witness on the trial. To permit the mere opinion of such witness thus formed and expressed as to the speed of the train, and its location at the time in question, to outweigh the positive evidence of four witnesses each speaking from knowledge as to the fact involved, would be in our judgment at once absurd and wholly unreasonable.

3. But if it could be said that the conclusion reached by us in the foregoing division of this opinion is open to doubt as to its correctness, still it remains to be said that defendant was entitled to a favorable ruling on its motion for new trial based on the subject-matter set forth in the third ground of the motion to instruct. By the third instruction given, the jury was told that the measure of duty on the part of defendant "was not to willfully or wantonly injure him after the said Graham had placed himself in a position of danger, and the employees of the defendant in charge and control of the train had actual knowledge of his position of danger, and, by the exercise of reasonable care, could have extricated him from same." In the tenth instruction it was said that, "If the conductor and brakeman, after being notified of Graham's position, could have stepped to the front end of the car and taken him in from the vestibule as quickly as the train could have been stopped by the use of the emergency, then it was their duty to go to the vestibule rather than stop the train." And in the eleventh instruction this: "In determining whether or not the conductor or brakeman should have stopped the train by using the emergency brake, you must consider the safety of the passengers on the train, and if the use of such brake would have endangered the safety of the passengers there was no duty which defendant owed Graham to so endanger the passengers." And such instructions became the law of the case. *Crane v.*

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Railway, 74 Iowa, 330, 37 N. W. 397, 7 Am. St. Rep. 479; Reynolds v. Keokuk, 72 Iowa, 371, 34 N. W. 167. Now, it is the evidence of Hooyer and Newgren that when they were taken into the car, the brakeman, Wright, demanded to know what they were doing out there, and if they had tickets. Hooyer says that he replied saying that "Graham who was on the other end of the coach in the same position he was in had the tickets." Newgren says that Wright was told simply that a friend up ahead had the tickets. Both agree that they at once started forward and when about half way through the car they met the conductor who demanded their tickets. They told him that Graham had them, and that he was on the front end of that car outside. The conductor turned back, and went with them to the vestibule, opened it, and found no one there.

The contention of plaintiff here, as in the court below, is that upon being informed that Graham was on the front end of the car it became the duty of the brakeman, and in turn, that of the conductor, to act at once by setting the emergency brakes on the train. And it is the failure to so act that is relied upon to sustain the verdict. A contradiction in the evidence as to what was done by Wright may be here noticed. Hooyer testified that Wright accompanied them as they went forward and met the conductor, while Wright says that he was not told that the boys had a companion on the outside at the head of the car, and that as the boys started forward he went inside the car and sat down. Now, as bearing upon the phase of the situation instantly under consideration, plaintiff brought forward no evidence save that the conductor who was in charge of the train in question was put upon the stand and testified that the train was equipped with air brakes; that these could be operated either from a valve placed in the closet of each car, or by the engineer upon signal given by pulling a rope which extended through the train and connected with the air whistle located in the cab of the engine. The witness further testified that in his judgment the train running at 15 miles an hour, could have been stopped in from 450 to 500 feet. On cross-examination the witness answered that stopping a train by use of a valve in one of the cars, called an "emergency stop," would be very unwise, unless in case of very serious accident; that the effect is to lock the wheels on the train, and is liable to injure passengers in the train. For the defendant, several witnesses, including the conductor, brakeman, and a division superintendent, were called, and all agree that an emergency stop, whether made by use of a car valve or from the engine, is fraught with danger; that it is liable to injure passengers by throwing them down if in the car aisles, or out of their seats if sitting; that if made by use of a car valve there is especial danger to the train, as it is liable to be torn in two. This is explained by pointing out that the wheels of the train become suddenly locked while the engineer is continuing to work steam; and reference is made to instances of accident and injury thus occurring. In addition to this, said witnesses testify uni-

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formly that less time would be consumed in going the length of a car and opening the vestibule door than would be required to stop the train, whatever the means employed. In the absence of any opposing testimony there can be no reason why such witnesses should not be believed and their evidence given controlling effect. Under the circumstances shown, therefore, it would be unreasonable in the extreme to hold that the conductor was the responsible cause of a willful or wanton injury. Conceding knowledge of the peril to Graham on the part of Brakeman Wright, it must be said for him, that in view of the uncontradicted evidence on the subject and the law of the instructions as given to the jury, he was doubly justified in not going to the car closet and setting the brakes on the train; there was the danger to the train and its passengers, and the most expeditious method of affording relief was by going to and opening the vestibule door. If then, as testified to by Hooyer, Wright started forward with the boys to go to the rescue—and plaintiff rested his case upon this theory—there can be no room for complaint of his action. If, on the other hand, as testified to by Wright—he went into the car and sat down, a proceeding scarcely believable if it had come to his understanding that Graham was clinging to the outside of the car—still there is nothing in the record from which it can be said that the work of rescue was interfered with or delayed thereby. The vestibule door was opened just as quick as it would have been, had he also gone to the forward end of the car.

The considerations expressed foregoing lead to the conclusion that the motion of defendant for a new trial should have been sustained, and the cause will be remanded that such may obtain.

Reversed.

FRENCH v. JONES.

(Supreme Judicial Court of Massachusetts, Suffolk, May 16, 1906.)

[78 N. E. Rep. 118.]

Street Railways—Receivers—Sale of Railway Line—Vesting of Title—Conditions.—Rev. Laws, c. 112, § 12, authorizes the receiver of a street railway company to sell the road, property, locations, and franchises of the company under order of court, and section 13 declares that the purchaser shall, within 60 days thereafter, organize a corporation to hold, own, and operate the railway purchased, and for a failure so to do declares that all rights and powers to operate the roads shall thereupon cease. Held that, where receivers of a street railway company sold its rails and tracks laid in a street to petitioner, the latter's failure to organize a corporation and operate the road did not divest him of title to the property purchased.

Same—Rails Laid in Street—Personal Property.—The rails of a street railway company imbedded in the streets of a city remain personal property, and are subject to disposition as such.

Same—Alienation of Franchise.—A street railway company has no power to alienate its franchise without permission of the Legislature.

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Same—Sale of Road—Failure of Purchaser to Operate.—Where the purchaser of the tracks and rails of a street railroad from the receivers of the corporation failed to organize a corporation within 60 days by which to operate the road, as required by Rev. Laws, c. 112, § 13, and thereby forfeited all right and power to operate the road as expressly provided by such section, and the gross receipts of the road were insufficient to pay operating expenses, such purchaser was under no duty to use the tracks so purchased for the operation of a street railway.

Municipal Corporations—Streets—Removal of Street Car Rails—Superintendent of Streets—Permit—Duties.—Waltham City ordinances provide that no person shall dig up any street without a written license from the superintendent of streets, and authorizes the superintendent to grant a license for the use of portions of streets under specified restrictions, providing that such license may be revoked by the superintendent at any time. The office of superintendent of streets for Waltham was created by St. 1893, p. 1002, c. 361, § 36, providing that he should have the power of a road surveyor and all the powers of road commissioners not otherwise conferred, and vested him with the power to determine whether in a particular case a license to authorize the digging of a part of the street should be granted. Held that, where petitioner owned the rails and tracks of a street railway imbedded in a street of such city, the superintendent of streets could not arbitrarily refuse a permit to remove them, because he hoped some other person or corporation would operate cars over them, but was bound to grant or refuse such license in the exercise of a legal discretion.

Same—Mandamus.—Petitioner was not entitled to mandamus to compel such street commissioner to grant a license for the removal of such rails, but was entitled to a writ commanding him to hear and determine petitioner's application without regard of any hope or desire that any person or corporation would operate cars over the tracks, and to determine the controversy as a matter of legal discretion on the basis that petitioner was the owner of the rails and was not bound to use them for the operation of cars.

Case Reserved from Supreme Judicial Court, Suffolk County; John Lathrop, Judge.

Petition by one French for mandamus to compel one Jones, as superintendent of the streets of the city of Waltham, to issue a permit for the breaking or digging up of the surface of the Trapelo road in Waltham to remove certain street railway rails from the street. Case reserved for full court. Granted.

Powers & Hall, for petitioner.

Chas. E. Stearns, for respondent.

SHELDON, J. The first question presented in this case is whether the petitioner has become the absolute owner of the rails and tracks laid by the street railway company and now lying on and imbedded in the surface of one of the public streets. He purchased all the property of the company at a sale properly made by duly appointed receivers of the company, and the receivers made a proper transfer to him. It is provided by Rev. Laws, c. 112, § 12, that "a receiver of the property of a street railway company may, by order of the court, sell and transfer the road and property of such company, its locations and franchises, on such terms and in such manner as the court may

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order. The purchasers from such receiver, and a corporation organized under the provisions of the following section, if such road has been transferred to it, shall hold and possess said road, all its rights and franchises and all property acquired in connection therewith, with the same rights and privileges and subject to the same duties and liabilities as the original street railway company; but no action shall be brought against such purchaser or such new corporation to enforce any liability incurred by said original corporation, except debts and liabilities owing from said original corporation to any city or town within which the road is operated and taxes and assessments for which said original corporation is liable under the statutes relating to street railways, which shall be assumed and paid by said new corporation. The provisions of this section shall not impair the powers of the holders of an outstanding mortgage to enforce their rights by suit or otherwise."

Section 13 of the same chapter provides that the purchasers at such a sale shall within 60 days thereafter organize a corporation for the purpose of holding, owning and operating the street railway purchased, and that if they fail to organize such a corporation in the manner therein prescribed, all rights and powers to operate the road shall thereupon cease. The respondent contends that the petitioner, never having organized or intended to organize such a corporation, and never having intended in any way to operate the street railway or cause it to be operated, but having made his purchase for the purpose only of removing and selling the rails, was not such a purchaser as is contemplated by the statute, and did not acquire any right to the property. We think however that the title to the property sold by the receivers did pass to the petitioner. It may be granted that the sections of the statute to which we have referred contemplate the continued operation of a street railway which has been sold under the authority that they give. But no such requirement is made in terms; and the provision in section 13 that upon failure to form a corporation to hold and operate the railway the right and power to operate it shall cease, is far from being tantamount to a provision that the purchasers shall suffer the further penalty of being deprived of the property which they have bought and paid for. The receivers have full power to make the sale; it is their duty to do so when ordered by the court which has appointed them; they have no right or duty to inquire into and no means of ascertaining the motives or intentions of bidders or purchasers. We are of opinion accordingly that the petitioner is the absolute owner of the property in question.

But his right to remove the rails and other materials which are imbedded in the surface of the public street, and for that purpose to break and dig up the street depends upon other considerations. It has been decided by this court that these rails and materials remain personal property. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500, 73 N. E. 646. But they were laid by a street railway company in pur-

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suance of a location granted to it and accepted by it and with the obligation to operate its road and thus to perform certain public duties; and they cannot be removed without digging up the surface of the street and making the public highway, at any rate partially and temporarily impassible. The petitioner does not contend that he has any right to remove the rails if he or the voluntary association which he represents is under any duty to operate this line as a street railway; and accordingly it becomes necessary to determine whether he is now under such a duty.

A street railway company, like a railroad corporation, has no power to alienate its franchise without permission of the Legislature. *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700. Our earliest statute upon this subject provided that "no street railway corporation shall sell or lease its road or property unless authorized so to do by its charter or by special act of the Legislature." St. 1864, p. 161, c. 229, § 24. And "any alienation either in fee or for the period of its corporate existence or for any less term of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and meaning of the prohibition." Gray, J. in *Richardson v. Sibley*, *ubi supra*. And subject to certain limitations not material to the decision of this case, the same prohibition has since remained in force (Pub. St. c. 113, § 56; St. 1897, p. 241, c. 269; Rev. Laws, c. 112, § 85 et seq.), except that in 1900 power was given to the receiver of a street railway company to make such a sale of its road, property, locations and franchises as is here in question. St. 1900, p. 322, c. 381; Rev. Laws, c. 112, §§ 12, 13, 14. The petitioner's rights accordingly depend upon the provisions of these sections.

The respondent contends that as it is expressly provided by section 12 that the purchasers at such a sale "shall hold and possess such road, all its rights and franchises, and all property acquired in connection therewith, with the same rights and privileges and subject to the same duties and liabilities as the original street railway company," and by section 13 that they shall within a limited time organize a corporation for the purpose of holding, owning and operating the street railway, they are under the same obligation to operate the railway and to carry passengers as rested upon the original company; and that this obligation can be terminated only by an order of the board of aldermen or selectmen ordering the street to be cleared of the tracks under Rev. Laws, c. 112, § 36, or revoking the location under Rev. Laws, c. 112, § 32. *Springfield v. Springfield Street Railway*, 182 Mass. 41, 48, 64 N. E. 577. But under the last clause of section 13, *ubi supra*, the petitioner has now no right or power to operate a street railway over these tracks; and we cannot construe the statute as continuing the existence of this duty after its performance has been forbidden by the very terms of the statute. The language of these sections is indeed mandatory; but looking at the object to be attained, the realization of

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an insolvent corporation for the payment of the fact that the penalty imposed for the to organize a corporation and operate the loss of the right and power to carry on the practical impossibility of continuing to whose gross receipts are insufficient to meet expenses, we are of opinion that the petitioner is any duty to use these tracks for the operation of a way.

we then, the case of an owner of personal property which embedded in the surface of a public way that it cannot be moved without breaking and digging up the surface. This way is situated in Waltham; and the ordinances of that city provide that "no person, unless authorized by law, shall break or dig up any part of any street or erect thereon any staging for building, place thereon any lumber, brick, or other building materials without a written license from the superintendent of streets. Any person intending to erect or repair any building upon land abutting upon a street shall give notice to the superintendent of streets, who may, at the owner's request, set apart such portion of the street as he may deem expedient for such use. Such person shall, when required by the superintendent of streets, construct and maintain a suitable sidewalk around the obstruction, and shall, before the expiration of his license, remove all rubbish and restore such street to its former condition, to the satisfaction of the superintendent of streets. Every person so licensed shall, in writing, agree to indemnify the city against all damage or loss to the city accruing from the doing of any act or thing under such license, and sureties may be required in the discretion of the superintendent of streets, and every person who, when so licensed, shall obstruct or render unsafe any public street or sidewalk, shall guard the same by a proper fence or railing and by lights during the nighttime, subject to the approval of the superintendent of streets. Such license may be revoked at any time by the superintendent of streets." Without a license granted by the superintendent of streets under this section, the petitioner cannot break or dig up any part of the way, and so cannot remove these rails. They have a value for a resale of more than six thousand dollars; but they are valueless to the petitioner unless they can be removed. The operation of a street railway line over these tracks never has produced, and there is no reason to believe that it ever could produce, sufficient income to pay the bare expenses of operation. The petitioner has made proper application to the respondent, who is superintendent of streets of the city of Waltham, for a license to take up these rails, and the respondent has refused and refuses to grant it. It has been found at the hearing before a single justice of this court that the respondent's refusal to issue the license did not result from the exercise of his judgment or discretion as to the proper care of the streets, or from the adverse termination of any question connected with such care or with the protection

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of the public travel, but from a desire to keep the rails in the streets in the hope that some person or corporation would operate street cars over them; and that the rails could have been removed and could now be removed without any permanent injury to the street or unreasonable disturbance of public travel. The petitioner asks this court to issue a mandamus commanding the respondent to grant such a license to the petitioner.

The office of superintendent of streets is created by the charter of the city of Waltham (St. 1893, p. 1002, c. 361, § 36), which provides that he "shall have the powers of a road surveyor and all the powers of road commissioners not herein otherwise conferred." He is charged with the duty of seeing that the streets are kept safe and convenient for travel; and he is to exercise his best judgment and discretion for the performance of this duty. He is vested with the power of determining in any particular case whether or not a license shall be issued to authorize the digging up of any part of a street or the erection thereon of any staging for building, the placing thereon of any building materials, or the temporary use of any portion of the street for the erection or repair of buildings abutting thereon. Many occasions may arise when either public or private interests or both would be seriously affected by his issuing or refusing to issue such a license; and it is for him to consider in each case the nature and magnitude of the interests involved, the extent and probable duration of any interference with public travel and the effect which may be produced upon the structure or paving of the way, and to determine whether or not, in view of all the circumstances and in the proper exercise of his discretion as a public officer charged with the care of the streets the license asked for ought to be granted. This he has not done in the case at bar, but has refused to issue the license prayed for merely from a hope and desire which ought not to have influenced his decision. He has not heard and determined the petitioner's application in the manner in which he ought to have heard and determined it; and we have no doubt that a mandamus may properly issue to compel him to do so. *Osborn v. Selectmen of Lenox*, 2 Allen, 207; *Dodge v. County Commissioners*, 3 Metc. 380; *Nourse v. Merriam*, 8 Cush. 11. It was his duty to hear and consider this application without regard to other considerations than those which we have stated, and not to base his action upon any such desire as has guided him. *People v. Supervisors of Delaware County*, 45 N. Y. 196; *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981. He has a right to refuse to grant the license asked for if in the proper exercise of his judgment and official discretion he decides that it ought not to be granted; but he has not the right to refuse it merely for a reason which lies outside the scope of his duty. Similar questions have often arisen in other jurisdictions; and, so far as we are aware, this doctrine always has been maintained. *Laclede Gas Co. v. Murphy*, 170 U. S. 78, 18 Sup. Ct. 505, 42 L. Ed. 955; *In re Excise Licenses* (Super. N. Y.) 38 N. Y. Supp. 425; *People v. Supervisors of Herkimer County*, 56 Barb. (N. Y.)

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452; *People v. Perry*, 13 Barb. (N. Y.) 206; *State v. Commissioners of Warren County*, 17 Ohio St. 558; *Zanone v. Mound City*, 103 Ill. 552; *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49; *Harwood v. Quimby*, 44 Iowa, 385; *Mobile Ins. Co. v. Cleveland*, 76 Ala. 321; *State v. Lutz*, 136 Mo. 633, 38 S. W. 323; *State v. Shannon*, 133 Mo. 139, 33 S. W. 1137; *State v. Barnes*, 25 Fla. 298, 5 South. 722, 23 Am. St. Rep. 516; *Stockton Railroad v. Stockton*, 51 Cal. 328; *Thomas v. Armstrong*, 7 Cal. 286; *Regina v. Fawcett*, 11 Cox, C. C. 305; *King v. Justices of Cumberland*, 4 Ad. & El. 695.

But the petitioner contends that he is entitled to a mandamus commanding the respondent to issue the license prayed for. He contends that in acting upon such an application the superintendent of streets performs a purely ministerial duty, that his discretion goes no further than to see that proper indemnity is given to the city against any damage or loss and that proper precautions are taken against accident, and to determine whether sureties shall be required from the licensee. But we have been referred to no authority in the statutes or ordinances for such a contention; and we are not aware that support can be found for it in any judicial decision. It has indeed been held that one who has an absolute and paramount right to do an act which necessarily involves the digging up of public streets may by mandamus compel the officers who are charged with the care of the streets to allow him to exercise that absolute right in a proper manner and with suitable safeguards. *Commonwealth v. Warwick*, 185 Pa. 623, 40 Atl. 93; *State v. St. Louis*, 145 Mo. 551, 46 S. W. 981; *State v. Latrobe*, 81 Md. 222, 31 Atl. 788. In the case at bar, however, no such absolute right can be found to exist. The petitioner bought the property with full notice of its character and position, and knowing that his power to remove it depended upon his ability to obtain a license from the superintendent of streets. It well may be that this officer cannot refuse a license upon wholly immaterial reasons or from mere wantonness or caprice; and that is all that was decided in *People v. Keating*, 55 App. Div. 555, 67 N. Y. Supp. 413; *People v. Colliss*, 17 App. Div. 448, 45 N. Y. Supp. 282, and *Laclede Gas Co. v. Murphy*, *ubi supra*. And it may be that he would not have the right to shut his eyes to proved facts, and rest a decision upon an alleged failure to find such facts, as was held in *Stockton Railroad v. Stockton*, *ubi supra*, though there might be a practical difficulty in reviewing his action in such a case. But none of these decisions support the petitioner's present contention.

We are of opinion that the correct rule to be followed in such a case as this was declared in *Keough v. Aldermen of Holyoke*, 156 Mass. 403, 31 N. E. 387. It appeared in that case that the petitioner had been duly elected collector of taxes for the city of Holyoke, but the board of aldermen denied his right to the office, claimed that another person had been elected, and upon that ground refused to accept the petitioner's official bond; and it was held that he was entitled to a writ of mandamus, declaring

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that he had been duly elected, and commanding the board of aldermen to consider the bond presented by him, and to accept or reject it as it might or might not be found to be satisfactory to them and in the form required by law, but that, although the board had put their refusal to accept his bond directly upon the ground that he had not been duly elected, yet they could not be required to accept his bond, for the reason that the bond must be in such sum as they should require and with sureties to their satisfaction. It is true that in that case the record of the board of aldermen had subsequently been amended by adding the statement that their refusal to accept the bond was for other reasons also; but the court in its opinion (page 408 of 156 Mass., page 387 of 31 N. E.) declined to pass upon the validity of this amendment, and rested its decision upon the general ground which has been stated. The same doctrine is affirmed in the well-reasoned opinion of the court in *State v. Latrobe*, 81 Md. 222, 31 Atl. 788, relied on by the petitioner, in which it is expressly declared that whenever the performance of a duty is dependent upon the exercise of judgment and discretion on the part of the person to whom its performance is assigned, that judgment and discretion will not be interfered with or controlled by the writ of mandamus, and this for the reason that there is no warrant of law justifying the substitution of the judgment of the court for the judgment and discretion of the individual exclusively intrusted with the performance of that particular duty. To the same effect are *Lunt v. Davison*, 104 Mass. 498; *Rice Machine Co. v. Worcester*, 130 Mass. 575; *Deehan v. Johnson*, 141 Mass. 23, 6 N. E. 240; *Provident Savings Society v. Cutting*, 181 Mass. 261, 63 N. E. 433, 92 Am. St. Rep. 415; *Rice v. Highway Commissioners of Middlesex*, 13 Pick. 225; *Inhabitants of Ipswich, Petitioners*, 24 Pick. 343; *Prickett's Case*, 20 N. J. Law, 134; *High, Extraordinary Legal Remedies*, §§ 80, 88, 91, 92, 97.

It is not necessary to consider in detail the different requests for rulings which were made by the petitioner. They are all disposed of by what has been said. In our opinion the petitioner is entitled to have a writ of mandamus issue, commanding the respondent, as he is superintendent of streets of the city of Waltham, to hear and determine the petitioner's application without regard to any hope or desire that some person or corporation will operate street cars over the tracks in question, but exercising in the manner hereinbefore stated his sound discretion as an officer charged with the care of the streets, in view of the fact that the petitioner is the owner of the property in question and is not under any duty to use it for the operation of street cars.

So ordered.

COMMONWEALTH ex rel. PHILADELPHIA, BRISTOL & TRENTON
ST. RY. CO. v. BOND *et al.*

(Supreme Court of Pennsylvania, March 5, 1906.)

[63 Atl. Rep. 741.]

Street Railroads—Use of Street.—A street railway company obtained from a borough the right to use a certain street, the borough reserving the right to grant the "common use" of such street to another company in common with the first company. The street was broad enough to accommodate two parallel tracks. Held, that the borough could not require a later company, having permission to use the same street, to so lay its tracks as to straddle the tracks of the other company.

Eminent Domain—Right to Compensation.—Where a street railway company is granted permission to lay its tracks in a street, allowing a later corporation to lay a part of its tracks on the tracks of a first company is an unconstitutional taking of the property of the first company.

Appeal from Court of Common Pleas, Bucks County.

Application by the commonwealth, on relation of the Philadelphia, Bristol & Trenton Street Railway Company, for writ of mandamus to Lewis R. Bond and others. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

George Quintard Horwitz, Francis K. Swartley, and Joseph W. Shelley, for appellant.

William C. Ryan and Lewis R. Bond, for appellees.

ELKIN, J. The appellant company by ordinance was granted a right by the borough of Morrisville to construct a track and operate a railway along, over and upon Bridge street for the distance of one block. At the time of the passage of the ordinance an older street railway company had in operation a line on Bridge street by rights required under a prior ordinance. The borough had imposed upon the first street railway corporation as a limitation of its grant the condition that it should only occupy Bridge street subject to the right of the borough at any subsequent time to grant to another street railway company the use of said street in common with it. The condition of the first grant is as follows: "Upon the express condition and with the clear understanding that the burgess and town council of said borough of Morrisville may at any time by ordinance grant to any other street railway company now or hereafter incorporated the use of Bridge street and Trenton avenue, or either of them in common with the Yardley, Morrisville, and Trenton Street Railway, its successors and assigns, and the right and power to grant such consent is hereby expressly reserved accordingly." Under this condition and reservation of rights in the prior ordinance it was clearly within the power of the borough to subsequently

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grant the right claimed by the appellant company in the common use of the street. These grants were made with the express condition imposed that the companies "shall be subject to such reasonable legislation in regard to the construction, maintenance, and operation of their street railway as shall from time to time hereafter be ordained and enacted by the said burgess and town council."

The borough under its authority to reasonably regulate the construction, maintenance, and operation of the later company in the use of the street, has required that its line be located in such manner as to straddle the tracks of the older corporation. The street has sufficient width to permit of the construction of both tracks thereon without interfering with each other, but for its own purposes the borough has thought proper to compel the construction of the track of the later company so as to occupy part of the track of the former company. The right to do this particular thing is claimed by the borough under the phrase "common use of the street" contained in the ordinance. When the first corporation accepted the ordinance under which its tracks were constructed with the reservation of the "common use" of the street to a later company it did not thereby agree to give the "common use" of its tracks over the street, but in effect waived its right to the exclusive use of the street. "Common use" of the street did not mean "common use" of its tracks. This court has decided that while the Legislature may in the exercise of the right of eminent domain take franchises and property engaged in a public use, and apply them to another public use, a statute cannot be sustained which confers upon one corporation for profit the right to appropriate the property of another corporation to exactly the same public uses for the convenience and profit of the younger corporation. *Philadelphia, Morton & Swarthmore Street Railway Company's Petition*, 203 Pa. 354, 53 Atl. 191. It has also been decided that section 14 of the act of May 14, 1889 (P. L. 216), as amended by the act of June 7, 1901 (P. L. 514), giving one street railway company the right to use the tracks of another street railway company for certain prescribed distances is unconstitutional. *Commonwealth v. Uwchlan Street Railway Company*, 203 Pa. 608, 53 Atl. 513.

The rule in these cases is based on the principle that the grant of the use of the tracks of a former company to a later company was the taking of property of the former company for the convenience and profit of a younger corporation, and therefore unconstitutional. The principle of those cases rules the one at bar. To superimpose on the tracks of the former company the whole or any part of the tracks of a later company, is the taking of property of the former company within the meaning of the rule of the cases just cited. There is no distinction in principal between the taking of the whole of the tracks of the former for the use of the later company and the taking of part of the tracks. The appellant company under its ordinance is

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entitled to construct and maintain its tracks on Bridge street alongside of and parallel with the line of the former company without in any way interfering with it.

Judgment reversed, and it is ordered and directed that judgment be entered for the plaintiff in accordance with the prayer of the petitioner asking for a writ of alternative mandamus.

BRACEY v. ST. LOUIS, S. F. & N. O. R. Co.

(Supreme Court of Arkansas, May 28, 1906.)

[95 S. W. Rep. 151.]

Eminent Domain—Compensation—Use of Street.—Where defendant's residence was situated on the corner of two streets, and after the construction of a railroad in one of the streets another road sought to condemn defendant's rights as abutting owner in the other street, defendant was not entitled to compensation from the condemning road because of an additional nuisance from the other road, owing to its being compelled to stop its trains in front of defendant's residence and to give signals, as required by the statutes in relation to the intersections of railroads.

Appeal from Circuit Court, Hempstead County; Joel D. Conway, Judge.

Condemnation proceedings by the St. Louis, San Francisco & New Orleans Railroad Company against Nannie B. Bracey. From a judgment assessing her damages, she appeals. Affirmed.

Scott & Head, for appellant.

T. C. Jobe and Glass, Estes & King, for appellee.

HILL, C. J. Mrs. Bracey owned a handsome and comfortable home in the town of Hope, which had been erected a few years ago by her late husband. The St. Louis, Iron Mountain & Southern Railroad main and side tracks were laid in the street just in front of her home. The appellee road brought suit against Mrs. Bracey to condemn her rights as abutting owner in Vine street, which was east of her residence, and at right angles to the street upon which the Iron Mountain tracks were already laid. This is an appeal by Mrs. Bracey from a judgment assessing her damages at \$100.

The first question urged is that the verdict is so shockingly against the evidence that it ought to be set aside. The appellee company, when it constructed its road in Vine street, was compelled to and did grade and gravel the street, and build concrete walks and, where necessary, retaining walls. There was substantial testimony that the construction of the railroad in Vine street had not damaged the property. Mrs. Bracey showed an expense item of \$59.82 for replacing a fence caused by the excavation for the railroad, and showed the destruction of three shade trees. The jury evidently by their verdict intended to

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compensate her for these items, and find against her on the other questions. It is true that the evidence on behalf of Mrs. Bracey showed very marked depreciation of value in the property on account of this road. The evidence is apparently candid, is reasonable of itself, and it is strange that it did not commend itself to the jury; but it did not, and the jury accepted the other evidence, part of which was from citizens obligated to pay the railroad company for the money it had to expend for right of way through the town. The evidence of the railroad company's witnesses and these interested parties is sufficient, if believed, to sustain the verdict, and the jury has said it does believe them, and that is the end of it.

The appellant offered to show that, by reason of the construction of this road along Vine street, the Iron Mountain road in front of her house had become an added nuisance in this way. It was now compelled to stop all of its numerous trains right in front of her house, and was compelled to ring bells and blow whistles, which it did not do prior to this crossing of another road, which compelled this additional action on its part. This additional inconvenience and annoyance, and evidently it is no inconsiderable matter, is caused solely by the statutes of the state requiring such stoppage and signals at the point of intersection of another road. The appellee road is responsible for all such damage which its operation may occasion, but is not responsible for that of the other road. When the Iron Mountain's right of way was acquired in front of this house, then compensation was made, or an opportunity had for compensation to be made, for all present and future damages to flow from the operation of the road in the due course of its business. It is part of the due course of a road's operation to make such stops and give such signals as the law or good railroading may require, and all annoyance, inconvenience, and injury from such an incident of railroad operation can be, and should be, compensated at the time of the acquisition of the right of way. When once acquired, then the railroad may lawfully use it in any way which good service and proper conduct of its affairs require, and for such conduct there is no resulting damage to the abutting property owner. See *Lewis on Eminent Domain*, § 151a; *Little Rock & Ft. S. Ry. v. Greer*. The court was right in excluding evidence of the increased damages from the Iron Mountain road.

Some other matters are presented, but none of moment, and finding no error, the judgment is affirmed.

BATTLE, J., being related to Mrs. Bracey, was disqualified, and did not participate.

BALTIMORE, C. & A. RY. CO. *v.* WICOMICO COUNTY COM'RS.

(Court of Appeals of Maryland, March 27, 1906.)

[63 Atl. Rep. 678.]

Taxation—Exemptions—Transfer—Rights of Purchaser.—Acts 1886, p. 209, c. 133, granted a railroad company exempted from taxation, and subsequently the railroad mortgaged its property and immunity from taxation. Held, that the purchaser at a sale under the mortgage did not acquire the exemption from taxation.

Same—Railroads—Mortgage Foreclosure.—Code 1888, § 187, provides that if any railroad be sold under a mortgage, the purchaser may form a corporation by taking certain proceedings, and section 188 provides that such corporation shall possess all the powers, rights, immunities, and privileges as to the property purchased as were possessed or enjoyed by the corporation which owned the railroad prior to the sale. Article 81, § 155, which was in force at the time that a corporation was formed under section 187, provides that the property of every railroad shall be assessed and taxed for county and municipal purposes. Held, that sections 187 and 188 did not confer on a corporation formed under section 187, immunity from taxation which had been granted the mortgagor railroad.

Constitutional Law—Obligation of Contract—Taxation.—Acts 1886, p. 209, c. 133, conferred on a railroad company already incorporated under the general corporation law (Acts 1876, p. 385, c. 242) immunity from taxation. Code 1888, art. 23, §§ 187, 188, provide that those purchasing a railroad at mortgage sale may form a new corporation, and section 188 provides that such corporation shall possess all the immunities and privileges in respect to the property purchased as were possessed or enjoyed by the corporation which owned the railroad prior to the sale. General Assessment Law 1896, p. 151, c. 120 (Code Pub. Gen. Laws, art. 81, § 2) declares that the property of every railroad shall be assessed for county and municipal purposes, but provides that nothing in the act shall discharge or release any irreparable contract or obligation. Held, that, conceding that a corporation formed under section 187 by the purchasers of the road incorporated under the general corporation law acquired the immunity from taxation possessed by the mortgagor road, there was no contract with the state within Const. U. S. art. 1, cl. 10, prohibiting the impairment of the obligation of contract, and the immunity from taxation was recalled by the general assessment law.

Appeal from Circuit Court, Wicomico County; Henry Page, Charles F. Holland, and Henry Lloyd, Judges.

Suit by the county commissioners of Wicomico county against the Baltimore, Chesapeake & Atlantic Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Argued before MCSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES. JJ.

Robert P. Graham, for appellant.

James E. Ellegood, for appellees.

SCHMUCKER, J. This appeal brings before us for the third time the claim of the appellant, the Baltimore, Chesapeake & Atlantic Railway Company, to an exemption from taxation. It first came here as a claim to exemption from municipal taxation, in the case of *Appellant v. Ocean City*, reported in 89 Md. 89,

42 Atl. 922. It next appeared before us upon a question of county taxation in the case of Appellant v. County Commissioners of Wicomico County, reported in 93 Md. 113, 48 Atl. 853. In each of these cases we held that the appellant was not entitled to the exemption. The history of the incorporation of the appellant and the grounds on which it rests its claim to the exemption are too fully set forth in the opinions filed in those two cases to require restatement here. We will, however, to facilitate the consideration of the present case, again advert to the salient facts upon which the appellant founds its contention. The Baltimore & Eastern Shore Railroad Company was incorporated in 1886 under those sections of the general corporation law which were enacted by chapter 242, p. 385, of the Acts of 1876. Certain additional powers, privileges, and immunities were granted to it by Acts 1886, p. 209, c. 133. The last-named act authorized the company to consolidate with or acquire by lease or purchase and operate any other railroad lying wholly or partly within this state, and further provided that "its franchises, property, shares of capital stock and bonds shall be exempt from state, county and municipal taxation for the term of thirty years accounting from the date of the completion of said road between the termini mentioned in its charter." The Baltimore & Eastern Shore Railroad Company, armed with these additional powers, purchased the Wicomico & Pocomoke Railroad on June 30, 1900, and on the following day made a mortgage upon all of the property and franchises which had been owned by either of the two railroads, to secure the payment of an issue of bonds. The property intended to be conveyed by the mortgage was therein described as: "All and singular the entire line of railroad of the party of the first part the Baltimore and Eastern Shore Railroad, situate, lying and being in the state of Maryland, between Broad Cove, Eastern Bay, Talbot county, and Salisbury, in Wicomico county, and extending from said termini through the counties of Talbot, Caroline, Dorchester and Wicomico, in said state, and also all the line of railroad from Salisbury, Wicomico county, and Hammock Point, in Worcester county, in said state, which said last-mentioned railroad comprised the railroad of Wicomico and Pocomoke Railroad Company, an entire distance of about ninety miles," and also steamboats, docks, piers, rolling stock, etc.; and the rights, privileges, franchises, immunities, and exemptions, including the "immunity and exemption from taxation granted to, conferred and bestowed on the party of the first part." Default having occurred under this mortgage, it was foreclosed in August, 1894, by a decree of the Circuit Court of the United States for the District of Maryland, and the entire mortgaged property and franchises were sold under the foreclosure to Nicholas P. Bond. He, along with certain associates, then formed the appellant corporation, with its principal office in Wicomico county, by filing a certificate with the Secretary of State under sections 187, 188, 189, and 190 of article 23 of the Code of 1888, for the purpose of operating the

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railroad property which had been purchased by him at the foreclosure sale.

The municipality of Ocean City levied taxes on certain property, lying within its corporate limits, which had originally been owned by the Wicomico & Pocomoke Railroad Company, but had been acquired, in the manner already mentioned, by the appellant, and was owned by it when the taxes were levied. The appellant refused to pay these taxes, whereupon the mayor and city council of Ocean City brought suit and recovered a judgment against it for the amount of the taxes in the circuit court for Worcester county, and we affirmed the judgment on appeal. In our opinion in that case we held that, as the property involved in that suit never had been owned by the Baltimore & Eastern Shore Railroad Company, it was not within the contemplation of the legislative exemption from taxation granted to that company by Acts 1886, p. 209, c. 133. We there further held, although perhaps not necessary for the purposes of that case, that the exemption from taxation granted by that act was in the nature of a personal privilege of the very corporation to which it was granted, and that it was not assignable, in the absence of express legislative authority, and that it did not pass to the purchaser of the Eastern Shore Railroad at the foreclosure sale. We relied in part, in support of the views there expressed by us, upon the *Chesapeake & Ohio R. R. Co. v. Miller*, 114 U. S. 186, 5 Sup. Ct. 813, 29 L. Ed. 121, where it was held that while those franchises of a railroad company which were rights and privileges essential to the operation of the corporation and without which it could not successfully conduct its road might be conveyed to a purchaser as part of the property of the company, immunity from taxation was not one of those franchises, but was personal to the company, and "was incapable of transfer without express statutory direction." We also relied upon *Picard v. East Tennessee, V. & G. R. Co.*, 130 U. S. 641, 9 Sup. Ct. 642, 32 L. Ed. 1051, where the court said: "Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation." The same proposition is stated with at least equal force and clearness, and supported by the citation of authority, in *Memphis & Little Rock R. R. Co. v. Berry*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837, where it was said, upon the authority of earlier decisions of the same court, that "the exemption from taxation must be construed to have been the personal privilege of the very corporation specific-

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ally referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This salutary rule of interpretation is founded upon an obvious rule of public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grants construed strictissimi juris."

The appellant carried the Ocean City Case by writ of error to the United States Supreme Court, which dismissed the writ for want of jurisdiction, as will appear from the memorandum case in 179 U. S. 681, 21 Sup. Ct. 918, 45 L. Ed. 384. When the Wicomico County Case, reported in 93 Md. 113, 48 Atl. 853, came before us, we applied the same doctrine to the liability of the appellant for the taxes there sued for, which had been levied by the county commissioners of Wicomico county upon certain portions of its roadbed and other property which had formerly belonged to the Baltimore & Eastern Shore Railroad Company, and had been sold to Nicholas P. Bond under the foreclosure of the mortgage made by that company. After the decision of that case by this court, Samuel Bancroft, Jr., a nonresident holder of mortgage bonds issued by the appellant, applied for and obtained from the circuit court of the United States for the District of Maryland an injunction restraining the county commissioners of Wicomico county from the levy or collection of the taxes upon that portion of the appellant's property which had formerly been owned by the Baltimore & Eastern Shore Railroad Company. We will refer to this injunction suit more at length further on in this opinion.

The present suit was instituted on December 27, 1904, to recover taxes levied by Wicomico county upon real and personal property assessed to the appellant for the years 1900 to 1904, inclusive. The defendant pleaded the general issue pleas and limitations, and by a special plea claimed the benefit of the exemption from taxation originally granted to the Baltimore & Eastern Shore Railroad Company by Acts 1886, p. 209, c. 133. The case was tried before the court without a jury upon an agreed statement of facts. The verdict and judgment were for the plaintiff, and the defendant appealed. The only bill of exceptions in the record is to the action of the court below upon the prayers. The pleas of limitation were demurred to, and the demurrer was properly sustained, because the pleas were to the entire declaration, while the taxes sued for in some of its counts had unquestionably accrued within the statutory period of limitations. There were some other questions of pleading raised by demurrers, which were not relied on at the hearing in this court, and do not affect the material issues in the case. The substantial issue of the appellant's right to the exemption from taxation claimed by it was raised by the prayers offered by it as defendant in the court below, all of which were rejected. The plaintiff offered no prayers.

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In our opinion the court below committed no error in rejecting the defendant's prayers. We have already stated in the cases in the 89th and 93d Maryland and in this opinion the proposition which require us to hold that the exemption from taxation granted to the Baltimore & Eastern Shore Railroad Company by Acts 1886, p. 209, c. 133, did not pass to Mr. Bond, the purchaser under the foreclosure of the mortgage made by that company, and therefore it could not have passed through him to the appellant. It remains to be considered whether any such exemption accrued directly from the state to the appellant corporation when it was organized by Mr. Bond and his associates in August, 1894, under sections 187, etc., of article 23 of the Code of 1888 Sections 187 and 188, which are the ones material to the subject now under consideration, are as follows:

"Sec. 187. In case of the sale of any railroad situated wholly within this state, or partly within this state and partly within an adjoining state, or the District of Columbia, heretofore or hereafter made by virtue of any mortgage or deed of trust, whether under foreclosure of other judicial proceedings, or pursuant to any power contained in said mortgage or deed of trust, the purchaser or purchasers thereof, or his or their survivor or survivors, representatives or assigns, may, together with their associates, if any, form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, or such portions thereof, as may be situated within this state, by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors," etc.

"Sec. 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or that part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this state, or the laws of any other state in which any part of such railroad may have been situated, not inconsistent with the laws of this state."

It is to be observed in the first place that there is nothing in either of these sections expressly dealing with or even referring to the subject of the taxation of corporations to be formed under their provisions. (The mode and extent of the liability of railroad corporations and their property to taxation is definitely and specifically provided for and regulated in article 81 of the Code.) Nor is there anything in either of these sections manifesting an intention to bestow the quality of alienability upon exemptions from taxation, already held by existing corporations, or to change the policy of the law in dealing with them. The declared object and purpose of those sections was to afford to the purchasers of "any railroad" at a foreclosure or judicial sale, and their associates, a convenient method of assuming a corporate

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form of organization "for the purpose [as therein expressly declared] of owning, possessing, maintaining and operating such railroad." Therefore the provision in section 188, that the new corporation, when formed, "shall possess all of the powers, rights, immunities, privileges and franchises in respect to such railroad" and its property which were possessed and enjoyed by the corporation that owned the railroad before its sale, should, by reasonable interpretation, be held to refer to and embrace only those powers, etc., enjoyed by the corporation formerly owning the railroad which had passed along with the road and its property under the foreclosure sale, together with such others only as might be necessary for conducting the new corporation and enabling it to successfully maintain and operate its railroad. Those provisions, so general in their nature and containing no reference to the subject of taxation, ought not to be held, by inference or implication, to confer upon the new corporation an advantage so exceptional and so opposed to public policy and so inconsistent with the existing laws of the state as an exemption from taxation, merely because the state had seen fit by a special act of the Legislature to grant such an exemption to a corporation which once owned the railroad which the new corporation is about to take over and operate.

The decisions of this court and of the United States Supreme Court are alike emphatic in their statement of the sound rule of construction that the taxing power is so essential to the existence of government that it is never presumed to be relinquished unless the intent to relinquish is expressed in plain terms, or, in the words of the Supreme Court, "in the clearest and most unambiguous language;" and the ascertainment of the intent cannot be left to inference or implication. Every reasonable intendment must be made that it was not the design to surrender the power of taxation or to exempt any property from its due proportion of the burden of taxation. *Buchanan v. Com'rs of Talbot County*, 47 Md. 293; *State v. Balt. & Ohio R. R. Co.*, 48 Md. 73; *Appeal Tax Court v. Rice*, 50 Md. 312; *Appeal Tax Court v. University*, 50 Md. 465; *Memphis & Little Rock R. R. Co. v. Berry*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837; *Ches. & Ohio R. R. Co. v. Miller*, 114 U. S. 186, 5 Sup. Ct. 813, 29 L. Ed. 121; *Picard v. East Tennessee, V. & G. R. Co.*, 130 U. S. 641, 9 Sup. Ct. 640, 32 L. Ed. 1051; *People of New York v. Cook*, 148 U. S. 409, 13 Sup. Ct. 645, 37 L. Ed. 498; *Phoenix Fire, etc., Co. v. Tennessee*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660. Furthermore, this state had distinctly declared its policy in reference to the local taxation of railroad property by legislative enactment which was in full force in August, 1894, when the appellant was incorporated, and still remains unrepealed. Section 155 of art. 81 of the Code of 1888 provides that: "The property real and personal of each and every railroad company in this state shall be assessed and taxed for county and municipal purposes in the same manner in which the property of individuals is now taxed." Even if the presence

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of section 155 on the statute book had not made it inconsistent with the existing laws of the state to so construe section 187 et seq. of article 23 as to make them operative to vest in the appellant, by virtue of its incorporation under their provisions, an exemption from taxation, such a construction would be in opposition to the well-settled principles of law to which we have already referred, governing the subject of exemptions from taxation. The provisions of section 187 et seq. did not become operative as to the appellant until it had accepted them by filing its certificate of incorporation, and therefore, for the purpose of ascertaining the extent of its powers and immunities, the law and the paramount policy of the state as they existed at that time must be applied. *Memphis, etc., R. R. Co. v. Berry, supra*; *People of New York v. Cook, supra*.

After the decision by us of the case of the Present Appellant v. Wicomico County, reported in 93 Md. 113, 48 Atl. 853, the United States Circuit Court for the District of Maryland, at the suit of Samuel Bancroft, Jr., who was the holder of certain mortgage bonds issued by the appellant, passed a decree enjoining the appellant from levying, assessing, or collecting the taxes on so much of its property as was formerly owned by the Baltimore & Eastern Shore Railroad Company. Upon an appeal by Wicomico county from that decree, it was affirmed by the United States Circuit Court of Appeals of the Fourth Circuit in the case of County Commissioners of Wicomico County v. Bancroft, reported in 135 Fed. 977. We are informed by counsel that that case is now upon the docket of the United States Supreme Court, having been taken there by a writ of certiorari, but has not yet been reached for trial. The controversy involved in that case has therefore not yet been finally disposed of. The Circuit Court of Appeals in their opinion agree that the exemption from taxation granted by the act of 1886 to the Baltimore & Eastern Shore Railroad Company was not assignable, and did not pass under the foreclosure sale. But they treat the incorporation of the appellant company under sections 187, etc., as a reorganization of the company to which the exemption was originally granted, and hold that out of such incorporation there arose a contract between the state and appellant within the meaning of article 1, cl. 10, of the federal Constitution, for an exemption similar to the original one. They further hold that: "The demand on the part of the county commissioners of Wicomico county is in the nature of a legislative act, and is, therefore, in violation of article 1, cl. 10, of the Constitution of the United States, which provides: 'No state shall pass any law impairing the obligation of contracts.'" They say in their opinion that by sections 187 and 188 of article 23 "it was clearly the intention of the Legislature to provide means by which corporations that became insolvent or otherwise embarrassed could be reorganized and continued under the provisions of the charter which originally brought them into existence. These sections were evidently framed for the purpose of providing for emergencies

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like the one presented in this case. There is a general inclination on the part of state Legislatures to grant immunities to railroads and other corporations with the view of encouraging the development of the particular section of country through which they are to be constructed. To undertake to build a short line of railroad in most sections of the country is a precarious one, to say the least of it, and, in the absence of aid by subscription or immunity from taxation, instances are very rare where individuals are willing to embark in such hazardous enterprises. In the present case the Legislature of Maryland seemed to adopt this policy, and, in order to secure the construction of a road, granted certain privileges, franchises, and immunities to the Baltimore & Eastern Shore Railroad Company for a period of 30 years, but it seems, with all the encouragement and aid which had been given this company, it was unable to stem the tide, and as a result its property was sold under foreclosure, and was purchased by the Baltimore, Chesapeake & Atlantic Railway Company. * * * In passing upon this question it is necessary to ascertain the legislative intent as contained in section 188, and an examination of that section leads us to the conclusion that the Legislature fully understood the force and effect of the different terms used therein. In construing section 188 as affecting the rights of the Baltimore, Chesapeake & Atlantic Railway Company, which was organized under its provisions, we are of opinion that the word 'immunities' was placed in said section for the purpose of exempting from taxation any and all companies thus reorganized which had been granted exemption from taxation by the Legislature in the first instance. In view of the decisions, we are forced to the conclusion that the word 'immunities' is an apt expression in the present instance, and must be construed to mean exemption from taxation."

We are unable to agree with the conclusion reached in that opinion that the word "immunities," as used in section 188, was placed there "for the purpose of exempting from taxation any and all companies thus reorganized which had been granted exemption from taxation by the Legislature in the first instance." In the first place, we do not think that section 187 et seq., were intended to provide for the reorganization of embarrassed corporations. They were, in our opinion, intended simply, as they declare on their face, to afford to purchasers of railroads at foreclosure or judicial sales, and their associates, an opportunity to form an entirely new corporation for the purpose of owning and operating the railroads purchased by them. The fact that the statute confers upon the corporation, when created, franchises, immunities, etc., to the same extent as those enjoyed by the company formerly owning the purchased railroad does not amount to a reorganization of that company. The franchises, immunities, etc., acquired by such an incorporation of the purchasers of the road are not received by any process of transfer from its former owner, but come as a fresh grant from the state at the time of the incorporation. Secondly, section 188 being

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silent on the subject of taxation, the general expressions there used, in conferring upon the corporation to be created under its provisions by the purchasers of a railroad, the franchises, immunities, etc., without specifying or describing them, which were enjoyed by the corporation owning the road before its sale, do not amount, in our judgment, to that "clearest and most unambiguous language" or manifest that "express and clear intention of the law" universally held to be indispensable to create a valid exemption from taxation. Furthermore, the exemption from taxation which was enjoyed by the Baltimore & Eastern Shore Railroad Company did not rest upon a "contract," in the sense in which that term is used in article 1, cl. 10, of the federal Constitution, with the state, but was the creature of a mere voluntary grant by the Legislature. It was not one of the terms of the charter of that company. It was granted by Acts 1886, p. 209, c. 133, which does not, either in its title or its contents, profess to amend the charter of the company. It is purely a spontaneous grant, made upon no condition and exacting no return. It has frequently been decided that such acts of the Legislature involve no contract relation, and may be repealed at pleasure, irrespective of any constitutional right of repeal on the part of the Legislature.

In *Christ Church v. Philadelphia*, 65 U. S. 300, 16 L. Ed. 602, the Legislature of Pennsylvania in 1833 passed an act reciting that Christ Church Hospital had for many years afforded an asylum to poor persons who would probably else have become a public charge, and enacting that the real property and ground rents belonging and payable to the hospital should, so long as they continued to be owned by it, be and remain free from taxes. In 1851 the same Legislature enacted a general law providing that all real and personal property belonging to any association or corporation which was then by law exempt from taxation, other than that which was in the actual use of the corporation or association or from which it derived an income, should be subject to taxation in the same manner as other property, and declared as repealed pro tanto all previous inconsistent legislation. The hospital corporation resisted the payment of taxes levied on certain of its lands under this act of 1851, upon the ground that the act of 1833, exempting the land from taxation, was, in effect, a contract, which was impaired by the taxation of the land under the act of 1851 in violation of the federal Constitution. The Supreme Court of the United States, when the case came to it on appeal, rejected the contention of the hospital, and held that, as the act of 1833 was a spontaneous concession of the Legislature and no service or duty or other remunerative condition was imposed upon the corporation, the exemption granted by it existed bene placitum, and might be revoked at the pleasure of the sovereign. The taxation under the act of 1851 was held to have been valid.

In *Tucker v. Ferguson*, 89 U. S. 527, 22 L. Ed. 805, it was held that a provision in an act of the Michigan Legislature of

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1871 exempting certain lands of the Flint & Pere Marquette Railroad Company from taxation for a certain number of years was not a contract, because there was no consideration for it, and the railroad company was required to do nothing, and did nothing, in return for it. It would have been a nude pact as between individuals, and "it had no higher character because one of the parties to it was a state and the other a corporation and it was put in the form of a statute. It was the promise of a gratuity, spontaneously made, which might be kept, changed, or recalled at pleasure." The court in that case affirmed the decree of the Circuit Court for the Western District of Michigan which refused to enjoin the state from taxing the railroad company before the expiration of the period of exemption fixed by the act of 1871. It does not appear from the report of that case that there had been any formal repeal of the act granting the exemption from taxation.

In *West Wisconsin R. R. Co. v. Supervisors*, 93 U. S. 595, 23 L. Ed. 814, *Tucker v. Ferguson* was cited and relied on in construing an act of the Legislature of Wisconsin of 1870 exempting from taxation lands of a railroad company for a certain period "upon the express condition that if said railroad company shall not have built their said road within two years from the passage of this act then and in that case this act shall be null and void." It was held in that case that the act in question did not constitute a "contract" within the meaning of the Constitution of the United States, and that the exemptions granted by it "were gratuities offered by the state without any element of contract." The court there say that the taxing power "may be restrained by contract in special cases for the public good, when such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it." It was also held that the condition in the act in reference to the early completion of the road did not alter the case; the court saying: "The early completion of the road was beneficial to the company as well as to the public. * * * If the company came within the condition specified in the act of 1870, it would be in a position to take the gratuity offered by that act. If this were so, the state might continue or withdraw that gratuity when it took effect, as it might deem best for the public welfare." The road was completed within the two years, but the Legislature, before the expiration of the exemption, passed a general act declaring liable to taxation the lands of any railroad, lying in the county traversed by the West Wisconsin Railroad, "not used for roadbed or depot purposes," and that act was held valid, although its effect was to withdraw, pro tanto, the exemption granted by the act of 1870. That case was affirmed in *Grand Lodge v. New Orleans*, 166 U. S. 149, 17 Sup. Ct. 523, 41 L. Ed. 951, and it has frequently been cited and relied on in the state courts.

It is difficult to see, in the light of these decisions, whose reasoning is both sound and forcible, how the exemption from

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taxation donated to the Baltimore & Eastern Shore Railroad Company by the act of 1886 amounted to more than a gratuity, spontaneously made, which was subject to recall at the pleasure of the state, and which could not operate as an effective restraint upon the future exercise of the taxing power by the state. It is true, the exemption was not, by the terms of the act, to begin until the completion of the road, but the company was not required to build the road, and when it did so it improved by so much the value of its own property. If, therefore, we concede, for the sake of the argument, that the present appellant acquired, by virtue of its incorporation under sections 187, etc., of art. 23 of the Code, the same kind of an exemption as that possessed by the Baltimore & Eastern Shore Railroad Company, we find it in possession of a mere gratuity, which might at any time be recalled by the state and which placed no restriction upon the subsequent exercise of the taxing power by the state. Now, in this state of the case we find that in 1896 the state, by the general assessment law enacted in chapter 120, p. 151, of the Acts of 1896, positively directed a new assessment for purposes of taxation to be made of all property in the state and taxes to be levied thereon. Section 1 of that act (amending section 2, art. 81, Code Pub. Gen. Laws) declares that the property, real and personal, of every railroad in the state shall be valued and assessed for county and municipal purposes, and later on in the act it directs the appropriate officials to proceed to tax such property. This, if not a formal repeal, which it is not disputed the Legislature could have made of the legislation under which the appellant claims its exemption, certainly would have amounted to a recall of the exemption, if any such there were, within the ruling of the last-cited federal cases, especially of the case of the West Wisconsin R. R. Co. v. Supervisors. See, also, County Com'rs v. Franklin R. R. Co., 34 Md. 159. It is significant that in the last section (section 2) of the act of 1896, p. 188, c. 120, directing the general assessment, is found this proviso: "Provided further however that nothing in this act contained shall be held to discharge or release, impair or affect any irrepealable contract or obligation of any kind whatsoever existing at the date of the passage of this act." This strongly indicates the intention of the Legislature that all existing contracts and obligations of any kind whatsoever, which were not irrepealable, were to yield to the provisions of the act in so far as inconsistent with them.

Our conclusions upon the whole case are that the exemption from taxation granted by Acts 1886, p. 209, c. 133, was intended to apply only to the Baltimore & Eastern Shore Railroad Company, and was not transferrable, and did not pass under the mortgage or otherwise from that corporation to the appellant; that the appellant did not, by virtue of its incorporation under section 187 et seq. of article 23 of the Code, acquire from the state any right to an exemption from taxation; that even if it had acquired by its incorporation such a right to an exemption

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as that enjoyed by the Baltimore & Eastern Shore Railroad Company, that right would have been recalled or extinguished by Assessment Act 1896, p. 151, c. 120; and that there exists, therefore, no obligation on the part of the state to exempt the appellant from that measure of local taxation to which it is liable under the provisions of article 81 of the Code. It results from these conclusions that the appellant is liable for the taxes to recover which this suit was instituted.

We entertain the highest regard for the learning and ability of the two federal tribunals who have expressed their opinions, in *Bancroft's Case*, upon the legal propositions which are vital to the decision now under consideration by us, but *Bancroft's Case* still remains undecided by the Supreme Court of the United States, where it is now pending. We, of course, hold ourselves ready to be governed by the decision of that high tribunal when it shall have spoken upon the subject of the alleged violation of article 1, cl. 10 of the federal Constitution by the levy of the taxes sued for in this case. In the meantime, as that question remains open, we feel constrained to be governed by our own view of the law and affirm the judgment appealed from in the case before us, which is a controversy between one of the counties of the state of Maryland and a corporation organized under its laws, which depends for its solution upon the proper construction of those laws.

Judgment affirmed, with costs.

HALL *v.* PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, May 7, 1906.)

[64 Atl. Rep. 408.]

Railroads—Illegal Use of Street—Remedy of Lot Owner.*—Complainant sued to enjoin defendant railroad company from making an unlawful use of street in front of his property. It appeared that the illegal occupation of the street was not wantonly or negligently done, but under stress of circumstances. Held, that the bill would not be dismissed, but a decree would be rendered giving defendant reasonable time to abate the nuisance or to come to an agreement with complainant, and, if the nuisance is not abated nor an agreement reached, will appoint a referee or otherwise as it may be expedient to ascertain the damages to complainant.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Robert C. Hall against the Pennsylvania Railroad Com-

*For the authorities in this series on the subject of railroads as nuisances, see foot-notes appended to *Townsend v. Norfolk Ry. & Light Co.* (Va.), 19 R. R. R. 635, 42 Am. & Eng. R. Cas., N. S., 635; foot-note appended to *Rainey v. Red River, etc., Ry. Co.* (Tex.), 19 R. R. R. 617, 42 Am. & Eng. R. Cas., N. S., 617; *Gossett v. Southern Ry. Co.* (Tenn.), 18 R. R. R. 706, 41 Am. & Eng. R. Cas., N. S., 706; foot-notes appended to *Davis v. Baltimore & O. R. Co.* (Md.), 18 R. R. R. 699, 41 Am. & Eng. R. Cas., N. S., 699.

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pany. From a decree dismissing the bill, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, PORTER, and ELKIN, JJ.

David T. Watson and William Kaufman, for appellant.

Patterson, Sterrett & Acheson, for appellee.

PER CURIAM. That the defendant was making an unlawful use of the streets in front of appellant's property specially injurious to him was found as a fact by the court below, and, indeed, was so clear that it was not really denied by defendant's counsel in this court. Being thus an admitted and continuing nuisance which could only be prevented at law by repeated actions, it is remediable in equity, and, where the enforcement of a clear legal right comes within the jurisdiction of equity, the doctrine of the respective inconvenience or loss to the parties has no place, and the duty to give relief is as mandatory as in courts of law. *Sullivan v. Steel Co.*, 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712. The learned judge below therefore was in error in dismissing the bill and imposing the costs on the plaintiff. It appears, however, beyond dispute, that the illegal occupation of the streets by defendant was not wantonly or even negligently done, but as a choice of evils in a situation of constantly increasing difficulty, involving very large public interests and convenience. While this consideration is not a bar to appellant's rights, it is a good reason for the exercise of the chancellor's discretion in the summary enforcement of such rights. And the appellant will have small ground for complaint of a little more delay in view of the facts as found by the court below that he bought the property when the conditions and use of the streets were the same, and as obvious as now, allowed between two and three years to elapse before filing his bill, and in the meantime, shortly before filing the bill, refused an offer from the defendant to lease the property at a much larger rental than that paid by his present tenants.

The decree is reversed, the bill directed to be reinstated and the injunction to be issued; the enforcement of the injunction, however, to be under the supervision and special orders of the court below so as to afford the defendant reasonable time to abate the nuisance. And at the proper time, if the parties do not agree, the court shall by appointment of a referee, or issue to a court of law, or otherwise, as it may deem most expedient, ascertain the damages to the plaintiff. Costs to be paid by the appellee.

SCOVELL *et al.* v. ST. LOUIS SOUTHWESTERN RY. CO. In re ST.
LOUIS SOUTHWESTERN RY. CO.

(Supreme Court of Louisiana, June 22, 1906.)

[41 So. Rep. 723.]

Expropriation—Prescription—Applicability.—Mrs. Volcy Amet v. Texas & Pacific Railroad Company, 41 South. 721, reaffirmed, to the effect that the prescription of two years under Act. No. 96, p. 142, of 1896, applies only where the property has been taken in pursuance of a judgment of expropriation.

Prescription—Minors.—Prescription of 10 years does not run against minors.

Railroads—Right of Way—Payment by Railroad Company.—A plantation was seized and sold after a railroad had appropriated and had been for some time using a right of way through it, and afterwards was repurchased, no mention being made in either sale of the right of way. Held, that the right of way did not pass with the plantation at the sheriffs' sale, and that the obligation to pay for it, which the railroad owed to the owners at the time of the appropriation, continued to be a debt due to these owners after they had repurchased the property.

Same—Dedication.—From this debt the railroad was not liberated by the act of the owners in laying off the land into streets and squares, according to a map placed of record, and selling lots as per the map. A railroad cannot acquire property by dedication, and no one pretends that the right of way in question belongs to the public.

(Syllabus by the Court.)

Certiorari to Court of Appeal, Parish of Caddo.

Action by Mrs. Mary Lee Scovell and others against the St. Louis Southwestern Railway Company. Judgment for plaintiffs, and the defendant applies for certiorari or writ of review to the Court of Appeal. Affirmed.

See 38 South. 582.

Alexander & Wilkinson, for applicant.

Charles Latham Gaines and *Thomas Fletcher Bell, Jr.*, for respondents.

PROVOSTY, J. The two plaintiffs are owners of the Plain Dealing and Shady Grove plantations, and sue the defendant railway company for the value of the right of way which it occupies across the places. The company took possession without title, but with the consent of the father and tutor of plaintiffs, who, by the way, was also the vice president of the company. This was in 1888, and the road has been in actual operation ever since. The plaintiffs were emancipated and dispensed from attaining the age of majority on August 2, 1896, and October 20, 1897, respectively. This suit was instituted in October, 1903. For part of the distance on Plain Dealing plantation, the road traverses the town of Plain Dealing, which was laid out into squares and streets by the father and tutor of plaintiffs, according to a map placed of record by him; and since their emancipation the plaintiffs have made sales as per this map. The plaintiffs lost the

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ownership of Shady Grove plantation, by a sheriff's sale made in 1895; but they repurchased the property in 1899. In these sales no mention was made of the railroad, or of the right to sue for the value, or use, of the land taken by it.

The first defense is the prescription of two years, under Act No. 227, p. 457, of 1902, amending Act No. 96, p. 142, of 1896, amending Act No. 117, p. 215, of 1886, amending Rev. St. § 1479, which is Act No. 38, p. 32, of 1855, incorporated in Civ. Code, art. 2630.

After thorough and mature consideration, this court held, in the case of *Mrs. Volcy Amet v. Texas & Pacific R. R. Co.* (not yet officially reported) 41 South. 721, that this prescription applies only where the property has been taken in pursuance of a judgment of expropriation. Here the prescription is inapplicable in this case.

The next defense is the prescription of 10 years, by which continuous and apparent servitudes are acquired, and personal actions are barred.

Article 3522, Civ. Code, provides that prescription does not run against minors "except in the cases provided by law." The cases thus provided by law are specified in article 3541, Civ. Code; and the prescription of 10 years is not one of them. The plaintiffs were minors up to the time of their emancipation in 1896 and 1897; hence this plea of prescription is not good.

The learned counsel for defendant say that the prescription of 10 years here invoked is not properly a prescription, but in the nature of a perpetual bar, and, as such, applies to minors. We fail entirely to see the force of this argument. The lapse of time by which a servitude is acquired, and by which a liberation from debts is effected, is certainly a prescription. It comes exactly within the codal definition of prescription.

The next defense has reference to Shady Grove alone. It is that, when plaintiffs reacquired the property, they got it in the condition in which it was; that is to say, with the railroad upon it, and that they cannot now object to the railroad's being upon it.

In answer to this, the plaintiffs say that they were owners of the plantation when the railroad came upon it and took possession of the right of way. That the effect of this taking was to segregate this right of way from the rest of the plantation, so that at the sheriff's sale, it did not pass as part of the plantation, but remained in the hands of the railroad; and that it so remained subject to the obligation to pay for it. That this obligation was a debt due to them, and has continued to be a debt due to them, not paid, and not prescribed.

This appears to us to be a complete answer.

The next defense is that, by laying off the property into squares and streets according to a map, and recording the map, and making sales as per the map, the plaintiffs have dedicated the right of way to the public.

This defense, we assume, has been put in only for what it might be worth. It is without merit. No one pretends that the

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public owns this right of way, and it is well settled that a railroad cannot acquire property by dedication. 9 A. & E. E. of Law, p. 23.

The judgment of the Court of Appeal is affirmed.
BREAU, C. J. I concur in the decree.

DUDLEY v. ILLINOIS CENT. R. Co. *et al.*

(Court of Appeals of Kentucky, Oct. 16, 1906.)

[96 S. W. Rep. 835.]

Removal of Causes—Citizenship—Joinder of Parties—Petition.*—Plaintiff, who was a brakeman on one of defendant railroad company's freight trains, sought to recover damages for injuries sustained by his being struck by a waterspout alleged to be too near the track. Plaintiff joined defendant M., whose citizenship was the same as plaintiff's, with defendant railroad company, whose citizenship was diverse, and alleged that M. had charge of defendant's waterspout, etc., and that the railroad company and M., as its agent and servant, had carelessly, etc., placed the post and pillars supporting the spout so near the track as to make its position dangerous, and that the spout was negligently permitted to hang in dangerous proximity to the top of the train; that by the negligence of defendant company and M. in placing the pillar, and in permitting the spout and connections to be in such condition, plaintiff was struck by the spout and injured. Held, that the petition stated a cause of action against both defendants, and that the court therefore properly denied the motion of the railroad company in the first instance to transfer the cause to the federal court.

Master and Servant—Injuries to Servant—Fellow Servant's Liability.†—A servant of a railroad company in charge of its water tanks, spout, pumping stations, and appliances under the direction of a superintendent, was not liable for injuries to a brakeman by striking a spout negligently placed too near the track, where such servant had nothing to do with the placing or adjusting of the pipe and fixtures, and was guilty at most of mere nonfeasance for failure to remedy the defect.

Removal of Causes—Renewal of Motion.*—Where, in an action for injuries to a servant, plaintiff joined a resident employee as a party defendant with the railroad company, which was a nonresident, and at the close of plaintiff's evidence no cause of action had been established against the resident defendant, and there was nothing to warrant the presumption that a stronger case could have been made out when the petition was filed, it was proper for the court to grant the railroad company's renewed motion for a removal of the cause to the federal court, on the ground that the citizen defendant had been joined for the sole purpose of preventing such removal.

Appeal from Circuit Court, Caldwell County.

"To be officially reported."

Action by William Dudley against the Illinois Central Railroad Company and others. From an order dismissing the suit as to

*For the authorities in this series on the subject of the right to remove cause to federal court because of diversity of citizenship, see foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

†See note, 20 R. R. R. 457, 43 Am. & Eng. R. Cas., N. S., 457.

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defendant Calvin Mitchell, and sustaining the application of the defendant railroad company to remove the cause to the federal court, plaintiff appeals. Affirmed.

Hendrick, Miller & Marble, for appellant.

Jno. C. Gates, Trabue, Doolan & Cox, J. M. Dickinson, and P. H. Darby, for appellees.

CARROLL, C. The appellant, who was a brakeman on one of appellee's freight trains, brought this suit against the appellee company and Calvin Mitchell to recover damages resulting from injuries sustained by being struck by a waterspout attached to a tank operated by the defendant company near Cerulean Springs. The petition averred: "That the defendant Calvin Mitchell was in the employ of the company, and was acting as its pumper or superintendent or supervisor or manager of pumps, tanks, and all the appliances and water tanks, along its road; that he had charge and management of the pumps, tanks, cranes, chains, posts, and all appliances of the pumping stations which furnished water to the engines of the company, and was paid by the company to do this work under its orders; that he was especially and directly in charge and control of the tank and crane and spout and pumping station and all the appliances thereof at Cerulean Springs, and of the supplying of water to the engines, and was actually managing and controlling said tanks, pump, spout and appliances; that the company and Mitchell, as its agent and servant in charge of said tank, had carelessly, wrongfully and negligently placed the post, pillar and support supporting the spout and crane which was used in supplying the engine with water, dangerously and unnecessarily near to the track, making the position of same improper, defective and dangerous, because of its proximity to the track, and had negligently permitted the chains, spout and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the train, so as to endanger the lives of the employees engaged in discharging their duties; that by the negligence of the defendant company and Mitchell in placing the post, pillar and support so near the track, and by their negligence in suffering and permitting the support and connections of the tank to be in such condition as to put the spout in dangerous proximity to the train, the plaintiff was struck by the spout upon the head and injured." The petition also contained other allegations necessary in cases of this character. In due time the railroad company, a foreign corporation, filed its petition and bond for removal of the cause to the United States Circuit Court. This motion the trial court overruled. Upon a trial of the case, at the conclusion of the evidence for plaintiff, now appellant, the defendant Mitchell entered a motion for a peremptory instruction, which was sustained by the court, and thereupon the jury returned a verdict for Mitchell. When the action against Mitchell was terminated in this way, the defendant company renewed its motion for removal,

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and it was sustained by the court. Appellant complains of the action of the trial court in giving the peremptory instruction and in removing the cause.

The petition stated a good cause of action against both the defendants, and the court properly refused to transfer the action when the motion was first made. *I. C. R. R. v. Coley*, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370; *Pierce's Adm'r v. I. C. R. R.*, 86 S. W. 703, 27 Ky. Law Rep. 801. Whether the transfer was proper, upon the conclusion of the evidence for appellant, depends upon the question whether or not Mitchell was joined as defendant in good faith. The mere fact that the trial judge sustained a peremptory instruction on behalf of Mitchell is entitled to some weight, but is not in itself conclusive evidence that Mitchell was not joined in good faith, or that appellant failed to make out a case against Mitchell. To determine therefore whether or not the action of the trial court was proper, we will examine the evidence introduced by appellant, and determine from it whether or not the averments of the petition stating a good cause of action against Mitchell were sustained. The substance of the allegations against Mitchell are that he was directly in charge and control of and actually managed and controlled the tank, crane, spout, pumping station, and all appliances connected therewith, and that as agent and servant of the company he carelessly and negligently placed the pillars, supporting the spout and crane, dangerously and unnecessarily near the track, making the same improper, defective, and dangerous because of its proximity to the track; and that the company and Mitchell negligently permitted the chains, spout, and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the cars. The evidence for plaintiff was to the effect that Mitchell was in charge of the tank and pump of the defendant on the Evansville & Hopkinsville Division, which included the tank at Cerulean Springs, and hired the pumpers, and that the tank at Cerulean Springs was some two feet nearer the track than the tank at Princeton on the same line; that Mitchell was working under one Noles, and had been seen repairing the tanks and machinery attached thereto; that the water pipe from the tank was the instrument that struck the appellant and knocked him off the train; that it was Mitchell's duty to examine the tanks and pumps at each station, and keep them in running order; and that the pipe that struck appellant was improperly adjusted and hanging too far over the track. There was no evidence whatever tending to show that Mitchell had anything to do with erecting the tank or placing or adjusting any of the fixtures or appliances thereon; nor does the evidence disclose whether the pipe that struck appellant was so constructed that it hung too far over the track, or was negligently permitted to hang in that condition by some persons when using it; nor does the evidence show that Mitchell could have reconstructed the tank or placed it further from the track, or have supplied it with different pipes or appliances, or that he was furnished by the

master with any other appliances than those in use, or that he had it in his power to do anything more than he had done. Mitchell was a subordinate employee of the railroad company, working under the superintendent or person who had charge of the tanks and pumping stations.

Assuming that it was the duty of Mitchell to keep these tanks and appliances in repair, and that the water pipe that struck appellant was hanging too low down, Mitchell could not be held liable to appellant, unless a servant such as Mitchell was is liable for nonfeasance, or for his failure to affirmatively take some action to remedy defects or dangerous appliances to which his attention may be directed. This precise question was before this court in *Cincinnati, New Orleans & Texas Pacific R. Co. v. Robinson*, 74 S. W. 1061, 25 Ky. Law Rep. 265, and it was there held that the petition having failed to show any cause of action against Robinson, the employee joined with the company, that it was proper to remove the case to the United States Circuit Court. In the case at bar, the evidence wholly fails to make out a case against Mitchell, and therefore the action of the trial judge in giving the peremptory instruction was proper. The petition for removal set out that Mitchell was joined as a defendant for the sole purpose, and with the fraudulent design, of preventing the transfer of the case to the United States Circuit Court, and that the allegations of the petition in respect to Mitchell were untrue, and could not be sustained by evidence; and, when the evidence on behalf of appellant disclosed a total failure to show any liability on the part of Mitchell, the conclusion remained that the allegations of the petition for removal were true.

In *Illinois Central R. Co. v. Coley*, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370, the engineer in charge of the train that injured plaintiff was joined as a defendant. A petition similar to the one in the case at bar was filed for removal, and overruled. On a trial, a verdict was rendered against the defendants. In discussing the question of removal, this court said: "If the engineer negligently ran the engine against the wagon in which appellee was riding and injured her, he is liable to her for her injuries. The fact that he did not own the engine, or that he was operating it in the service of the railroad company, makes him none the less liable for his personal wrong. If, in operating the engine, he was acting as agent of the railroad company, and his act was its act, then it is also responsible to her upon the principle that he who does an act by another does it himself." In that case the evidence justified the finding that the engineer was guilty of an affirmative act of negligence, and, although a subordinate employee, was jointly liable with his principal for his negligent conduct. The court further said: "If the plaintiff trifled with the court, and joined a defendant who is a resident of the state simply for the purpose of defeating the right of the other defendant to remove the case to the federal court, the court should, as soon as this is made apparent on the trial, dismiss the action as to the defendant fraudulently joined, with costs, and

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remove the case to the federal court. The court should not at any stage of the proceeding allow a party to trifle with its process, or to defeat the courts by fraudulent joinder of a person as a defendant."

If the plaintiff can by stating in his petition a good cause of action against a resident defendant, and thereby prevent the nonresident defendant from transferring the case, although upon the trial the evidence wholly fails to show any cause of action against the resident defendant, the result would necessarily be that in every case where this was done a removal could be prevented, and the plaintiff, by the fraudulent or mistaken joinder of a person as a defendant, could defeat the jurisdiction of the federal court. *Powers v. C. & O. Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. It is true that it is for the state court to determine from the record, when the motion for a transfer is made, whether or not there is then presented a state of case authorizing a transfer. *Illinois Central R. Co. v. Jones' Adm'r*, 80 S. W. 484, 26 Ky. Law Rep. 31; *Rutherford v. Illinois Central R. Co.*, 85 S. W. 199, 27 Ky. Law Rep. 397. And it has been ruled in a number of cases that the motive or purpose of the plaintiff in joining the defendants will not be inquired into, provided a cause of action is stated against them jointly. *Winston's Adm'r v. Illinois Central R. Co.*, 23 Ky. Law Rep. 1283, 65 S. W. 13, 55 L. R. A. 603; *C. & O. Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Rutherford v. Illinois Central R. Co.*, 85 S. W. 199, 27 Ky. Law Rep. 397. But when, during the progress of the trial—for instance, at the close of the plaintiff's evidence—it becomes apparent that no cause of action has been made out against the resident defendant, and there is nothing in the record to warrant the presumption or conclusion that a stronger case could have been made out when the petition was filed, the court will not sit idly by and permit a plaintiff, by making allegations that he must have known he could not establish, to deprive the defendant of a right guarantied to it or him by the law. However reluctant state courts may be to surrender their jurisdiction, they cannot lend themselves to a scheme to defeat rights to which one of the parties litigant is entitled, or permit a skillful pleader to determine the question of removal without reference to the merits of the case.

The case of *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, is not in conflict with these views. It is true that in that case, at the close of the testimony for plaintiff, the trial court sustained a peremptory instruction offered by the resident defendant, and thereupon the nonresident defendant again moved to transfer the case, and this motion was overruled. In sustaining this ruling, the Supreme Court said: "This was a ruling on the merits, and not a ruling on the jurisdiction. It was adverse to the plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby enable the other defendants to prevent

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plaintiff from taking a verdict against them. As we have said, the contention of that railway company that it was fraudulently joined as a defendant had been disposed of by the United States Circuit Court. But, assuming without deciding that that contention could not have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it." It will thus be seen that the decision of this question is rested upon the grounds: First, that it had been disposed of by the United States Circuit Court; and, second, that the record did not show a fraudulent joinder.

The judgment of the lower court is affirmed.

WHITE'S ADM'R v. CHICAGO, ST. L. & N. O. R. Co. et al.

(Court of Appeals of Kentucky, Oct. 24, 1906.)

[96 S. W. Rep. 911.]

Removal of Causes—Joinder of Parties—Citizenship.*—In an action for death, plaintiff joined a resident corporation and two nonresident corporations, charging that defendants, together and jointly, were engaged in the building of a bridge over the Tennessee river, and that plaintiff's intestate was employed by the three defendants to work on the bridge, and while so engaged was killed by the fall of a mortar bucket, owing to the negligence of the three defendants and to the improper, defective, and unsafe condition of the machinery in use. Held, that the petition stated a cause of action against all the defendants, which precluded a removal of the cause to the federal court by the nonresident defendants, on a petition alleging that the resident corporation was joined for the fraudulent purpose of preventing a removal, etc.

Same—Fraudulent Joinder—Proof.—Where, in an action for death, a joint cause of action is stated against several defendants, one of whom is a resident of the same state as plaintiff, the other defendants, on proving at the trial that the resident defendant was joined for the fraudulent purpose of preventing a removal of the cause to the federal court, may then avail themselves of the misjoinder, and remove the cause.

Appeal from Circuit Court, Livingston County.

"Not to be officially reported."

Action by Richard White's administrator against the Chicago, St. Louis & New Orleans Railroad Company and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Hendrick & Miller, for appellant.

Trabue, Doolan & Cox, Bush & Grassham, and *J. M. Dickinson*, for appellees.

CARROLL, C. The appellant brought this action against the Chicago, St. Louis & New Orleans Railroad Company, the Illinois Central Railroad Company, and Bates and Rogers Construc-

*See preceding case, and foot-notes.

White's Adm'r v. Chicago, etc., R. Co

tion Company, charging that the first-named defendant was a Kentucky corporation and the other two defendants Illinois corporations, and that they were "together and jointly engaged in the building of a bridge over and across the Tennessee river in and near the boundary of Livingston county, and the plaintiff's intestate, Richard White, was employed and hired by the said three defendants to work upon said bridge, and was engaged in their service, and laboring upon said bridge for said defendants, and while so engaged was struck and almost instantly killed by a large bucket used in conveying mortar and cement to the bottom of a caisson in which he was working. That this bucket was thrown or caused to fall upon and kill said White by the negligence of the said three defendants, their agents and servants superior in rank to said White, and by and because of the improper and defective and unsafe condition of said machinery, which said defective, improper, and unsafe condition of said machinery and appliances was known, or by the use of ordinary care could have been known, by them, but was not known to him." The nonresident appellees in due time filed their petition for removal, averring that the domestic corporation was joined for the fraudulent purpose of preventing the removal, when in fact there was no cause of action against it.

The petition states a good cause of action against all the defendants, and appellant had the right to join all of them in one action. This being true, the record as presented did not warrant the removal of the cause. Appellees in the petition for removal stated that the domestic corporation had many years previous to the injury complained of leased to the Illinois Central Railroad Company for a long term of years its railroad and all rights and privileges connected therewith, and the lessee under the contract was in the exclusive possession thereof, and that the resident corporation had nothing whatever to do with the building of the bridge or the work on which the decedent was employed; that he was working for Bates & Rogers Construction Company, an independent contractor, and solely responsible for the negligence, if any, that resulted in his death; that appellant was fully acquainted with all these facts when the action was instituted. It may be true that upon the trial of the case appellees can establish the state of facts set up in their petition for removal, and, if so, they can then avail themselves of the misjoinder, if there be any. The mere fact that the petition for removal on its face sets out conditions which if true would authorize a removal will not be accepted as conclusive upon the showing made by the petition for removal alone, when the petition, as in this case, states a joint cause of action against all of the defendants. *I. C. R. R. Co. v. Coley*, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370.

The judgment is reversed, with directions to proceed in conformity to this opinion.

ROBY v. STATE *ex rel.* FARMERS' GRAIN & LIVE STOCK Co. *et al.*

(Supreme Court of Nebraska, April 18, 1906.)

[107 N. W. Rep. 766.]

Railroads—Side Tracks—Public Highways.—A side track, constructed and used by a railroad company, and which connects with its main line and occupies a portion of the public streets of a city, under a grant from the city to such company, will be presumed, in the absence of evidence to the contrary, to be a part of the public highway system of such company, and a public highway, within the meaning of Const. art. 11, § 4.

Same—What Constitutes.—The term "railroads" includes all side tracks necessary or convenient for the transaction of the company's business.

Same—Use of Side Track.—Evidence examined, and held sufficient to sustain the finding and order of the trial court.

(Syllabus by the Court.)

Commissioners' Opinion, Department No. 2. Error to District Court, Buffalo County; Hostetler, Judge.

Action of the state, on the relation of the Farmers' Grain & Live Stock Company, for writ of mandamus against the Union Pacific Railroad Company. Frank F. Roby intervened. From an order allowing the writ, intervener brings error. Affirmed.

E. C. & H. V. Calkins, for plaintiff in error.

Warren Pratt, C. A. Robinson, Edson Rich, and John N. Baldwin, for defendant in error.

ALBERT, C. The Farmers' Grain & Live Stock Company applied to the district court for a writ of mandamus to compel the Union Pacific Railroad Company to furnish cars on a certain side track for the shipment of grain from the relator's elevator. Frank F. Roby intervened for the purpose of resisting the application. The district court allowed the writ, and the intervener brings error.

A somewhat extended statement of the facts is necessary to a proper understanding of the case. In 1886 the Kearney Milling Company built a flouring mill in the city of Kearney, and induced the respondent railroad company to construct a side track, extending eastward from its connection with the main track to and across certain lots owned by the milling company, upon which its mill stood. In order to reach the mill property, the track was constructed for some distance on a public street, and across certain other streets and alleys of the city, and also across the corner of a lot belonging to a third party. This side track extended east and west immediately north of the mill, and a warehouse and elevator were afterward erected by the milling company immediately north of the side track. Afterward the milling company moved its elevator to two lots, belonging to it, lying east of the premises just mentioned, and just across one of the alleys of the city, and the side track, in order to accommodate the elevator in its new location, was extended eastward

Roby v. State

across the alley and across a lot belonging to the milling company. In 1898, proceedings were brought to foreclose a mortgage covering the milling company's property, and the property passed into the hands of a receiver appointed in said proceedings. The receiver leased the elevator or the lots east of the mill to certain third parties, and such lessees leased certain lots, belonging to other parties, lying east and just across a public street from the elevator, and, for the better construction of the elevator, induced the respondent railroad company to extend the side track across such street and one of the lots east of the elevator property. The mortgage was foreclosed, and the intervener became the purchaser thereof at foreclosure sale, obtaining possession thereunder in March, 1899. Early in the summer of 1901, he inclosed the mill property with a fence, placing gates across the side track securing them by locks. At that time, however, service on the side track was not required beyond the west line of the intervener's property, save for the accommodation of the intervener himself. In 1903, the relator bought the two lots lying across the street from the elevator, and across one of which the side track had been extended, and erected thereon a grain elevator for the storage and shipment of grain. The relator's elevator was so placed that it could be easily accommodated by the side track in question. When the elevator got ready to ship grain from its elevator, the intervener refused to permit the respondent to move cars over the side track across his premises, claiming that such track had been constructed solely for the accommodation of his grantors, and that the occupancy of his premises by the respondent with its track was merely by virtue of a license, and not by virtue of any easement in such premises for a right of way.

The evidence is somewhat meager as to the arrangement between the milling company, the intervener's predecessor in estate, and the respondent railroad company for the construction of the side track in the first place. One witness, who was president of the milling company during the negotiations for the side track, and who took part therein, when examined as to such arrangement, testified as follows: "My recollection is they insisted we should give them a right of way, and there was a lot west of the mill. They sent a man out here at that time. There was some question as to whether the city would let us down through there, and they sent a man out to see whether they could get to the mill. He reported that he would have to go across that lot that was right across there west; that he would have to cut off the corner of it; if he crossed there would be a short curve; that the curve would be too sharp; and they insisted, in case there was any damages, that the milling company would have to pay the railroad company whatever damages there was to that lot. That is my recollection. Q. Was the milling company to get any damages or anything for the right of way across this property? A. I don't think so; of course, that is a long time ago. * * *"

Cross-examination: "Q. They

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wanted a switch to the mill so that they could load and unload? A. Yes. Q. They wasn't seeking to get it for any other purposes excepting the accommodation of the mill? A. That was all. Q. Any talk of it being used for anything else? A. So far as I can recollect there was not. Q. There was no agreement that it was not to be used for any purpose but for your mill, was there? A. I have no recollection of anything being said." It also appears that, when the milling company moved its elevator to the lots east of the mill, the respondent agreed to extend the track and pay for moving the elevator. In each instance it laid the track and furnished the material. Before the side track was constructed, the city granted the respondent a right of way over and across such of the streets and alleys as it traversed or crossed.

These facts, we think, warrant the inference that the respondent constructed the side track across the intervener's premises under at least an implied grant of a right of way from the intervener's privies in estate, the then owners of the premises, and that such track now constitutes a part and parcel of the respondent's railroad system, open alike to all requiring service thereon. Section 4, art. 11, of the Constitution is as follows: "Railways heretofore constructed, or that hereafter may be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. * * *" The term "railroad" includes all side tracks necessary or convenient for the transaction of the company's business. *Rock Creek Township v. Strong*, 96 U. S. 271, 24 L. Ed. 815; *Black v. Philadelphia & R. R. Co.*, 58 Pa. 249; *Town of Mason v. O. River R. R. Co.*, 51 W. Va. 183, 41 S. E. 418; *State v. Stone*, 119 Mo. 668, 25 S. W. 211. The side track in question is connected with the respondent's main line. In the absence of evidence to the contrary, taking into account the fact that it crosses the property of third parties and occupies a portion of the public streets of the city under a grant from the city, the presumption would be that it is a part of the respondent's railroad system, and a public highway within the meaning of the constitutional provision above quoted. That presumption is not rebutted by the evidence in this case, but rather strengthened. The evidence shows that, before constructing the road, the respondent, in its negotiations with the milling company, the intervener's predecessor in estate, insisted on a right of way. It is true it was built at the instance of the milling company, and for years was used almost, if not quite, exclusively for its benefit, but that appears to have been because there were no other persons who could be accommodated thereby. It is also true that the intervener, after the track had been laid almost 15 years, put gates across it, and inclosed his premises with a fence; but at the time there were no persons beyond his premises who required service on the side track, and the gates, therefore, were no restriction on general traffic.

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district court allowing the writ is affirmed.

BERG v. NEW JERSEY SHORE LINE R. Co.

Errors and Appeals of New Jersey, June 18, 1906.)

[64 Atl. Rep. 114.]

Domain—Location of Railroad—Property Subject.—The
by a railroad company of its right of way over lands of the
which from considerations of public policy it cannot acquire
by consent or condemnation, does not invest such company
the right to condemn other lands covered by such location.
by the Court.)

Error to Supreme Court.

Certiorari action by Alexander J. Shamberg against the New
Jersey Shore Line Railroad Company. Judgment for defendant
on certiorari to appointment of commissioners (60 Atl. 46), and
plaintiff brings error. Reversed.

William H. Corbin, for plaintiff in error.

Vredenburg, Wall & Van Winkle, for defendant in error.

GARRISON, J. This writ of error brings up a judgment ren-
dered in proceedings upon certiorari, and affirming an order
appointing commissioners to condemn lands of the plaintiff in
error, who was the prosecutor in certiorari. The land of the
prosecutor proposed to be taken for railroad purposes is a strip
about 1,000 feet in length which constitutes the ripa of the
Hudson river whose high-water line is its easterly boundary.
The strip varies in width from a few inches to a few feet and is
the westerly part of the delocated route, all the rest of which
lies below the high-water line of the Hudson river.

The title to these lands which thus constitute almost the whole
of the located right of way of the defendant in error is in the
state of New Jersey. This circumstance furnishes the ground
upon which the plaintiff in error by his second assignment chal-
lenges the legality of such location so far at least as regards its
validity to support the proceedings brought up by this writ. The
contention of the plaintiff in error is that the railroad company
is not invested with the power to condemn his lands unless its
located route be susceptible of acquisition by it, and that the
land of the state covered by the present location cannot be ac-
quired by grant because of section 40 of the act concerning

Shamberg v. New Jersey Shore Line R. Co

rights (Gen. St. p. 2794) which confers a pre-emptive on the plaintiff in error as riparian owner, and that it be acquired by condemnation because of section 139 of act under which the defendant in error is incorporated, which provides that "no company shall be authorized to take by condemnation any land belonging to the state of New Jersey." P. L. 1903, p. 653. The facts upon which this contention rests are not controverted by the defendant in error who concedes that as long as existing conditions last, the lands of the state, upon which it has located its route, cannot be acquired by it, but contends that if the plaintiff in error or some subsequent owner of the ripa should at some future period take a grant from the state for such lands they would thereby become subject to condemnation by the defendant in error under its present location, or that if the six months' notice required by the riparian act should be given to such riparian owner he would either have to take a grant of said lands himself, in which case they would become subject to condemnation, or in default thereof the person giving such notice could obtain such grant from the state and thereby subject the title so taken to condemnation if the defendant in error did not, by giving such notice itself, obtain such grant to be made to it directly. This argument, however, is obviously no answer to the attack made by the plaintiff in error upon the validity of the located right of way of the defendant in error to sustain the present proceedings. Indeed, such argument throughout assumes the validity of such location not only for all present purposes, but also for future conditions that are admittedly either speculative or contingent. Such argument also loses sight of the fact that the located route of a railroad company is not only a limitation upon the extent of its right to condemn lands but that it is, if not the source, at least the channel through which such right must flow to it. Through no other channel under our general legislation, does the sovereign power of eminent domain become vested in a railroad company as a public agent. It is by the location of its route and not by the institution of proceedings to condemn that a railroad company constitutes itself the accredited agent of the state in this behalf. The former is in effect the criterion of the right to employ the latter. Indeed the last-mentioned proceeding is merely the prescribed mode of ascertaining the sum of money such public agent must pay as the equivalent of the private rights that will be taken or destroyed by the construction of its road upon its located route. The extinguishment of these private rights is, however, upon constitutional grounds so annexed to the grant of the sovereign power that such payment and consequently such ascertainment constitute an imperative condition of such grant. If, in any case, this condition is not performed, the right of condemnation has not been exercised, but if the condition cannot be performed the right of condemnation has not been acquired. So that there is much force in the contention that a route that is so located by a railroad company that

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public owns this right of way, and it is well settled that a railroad cannot acquire property by dedication. 9 A. & E. E. of Law, p. 23.

The judgment of the Court of Appeal is affirmed.
BREAU, C. J. I concur in the decree.

DUDLEY v. ILLINOIS CENT. R. CO. *et al.*

(Court of Appeals of Kentucky, Oct. 16, 1906.)

[96 S. W. Rep. 835.]

Removal of Causes—Citizenship—Joinder of Parties—Petition.*—Plaintiff, who was a brakeman on one of defendant railroad company's freight trains, sought to recover damages for injuries sustained by his being struck by a waterspout alleged to be too near the track. Plaintiff joined defendant M., whose citizenship was the same as plaintiff's, with defendant railroad company, whose citizenship was diverse, and alleged that M. had charge of defendant's waterspout, etc., and that the railroad company and M., as its agent and servant, had carelessly, etc., placed the post and pillars supporting the spout so near the track as to make its position dangerous, and that the spout was negligently permitted to hang in dangerous proximity to the top of the train; that by the negligence of defendant company and M. in placing the pillar, and in permitting the spout and connections to be in such condition, plaintiff was struck by the spout and injured. Held, that the petition stated a cause of action against both defendants, and that the court therefore properly denied the motion of the railroad company in the first instance to transfer the cause to the federal court.

Master and Servant—Injuries to Servant—Fellow Servant's Liability.†—A servant of a railroad company in charge of its water tanks, spout, pumping stations, and appliances under the direction of a superintendent, was not liable for injuries to a brakeman by striking a spout negligently placed too near the track, where such servant had nothing to do with the placing or adjusting of the pipe and fixtures, and was guilty at most of mere nonfeasance for failure to remedy the defect.

Removal of Causes—Renewal of Motion.*—Where, in an action for injuries to a servant, plaintiff joined a resident employee as a party defendant with the railroad company, which was a nonresident, and at the close of plaintiff's evidence no cause of action had been established against the resident defendant, and there was nothing to warrant the presumption that a stronger case could have been made out when the petition was filed, it was proper for the court to grant the railroad company's renewed motion for a removal of the cause to the federal court, on the ground that the citizen defendant had been joined for the sole purpose of preventing such removal.

Appeal from Circuit Court, Caldwell County.

"To be officially reported."

Action by William Dudley against the Illinois Central Railroad Company and others. From an order dismissing the suit as to

*For the authorities in this series on the subject of the right to remove cause to federal court because of diversity of citizenship, see foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

†See note, 20 R. R. 457, 43 Am. & Eng. R. Cas., N. S., 457.

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defendant Calvin Mitchell, and sustaining the application of the defendant railroad company to remove the cause to the federal court, plaintiff appeals. Affirmed.

Hendrick, Miller & Marble, for appellant.

Jno. C. Gates, Trabue, Doolan & Cox, J. M. Dickinson, and P. H. Darby, for appellees.

CARROLL, C. The appellant, who was a brakeman on one of appellee's freight trains, brought this suit against the appellee company and Calvin Mitchell to recover damages resulting from injuries sustained by being struck by a waterspout attached to a tank operated by the defendant company near Cerulean Springs. The petition averred: "That the defendant Calvin Mitchell was in the employ of the company, and was acting as its pumper or superintendent or supervisor or manager of pumps, tanks, and all the appliances and water tanks, along its road; that he had charge and management of the pumps, tanks, cranes, chains, posts, and all appliances of the pumping stations which furnished water to the engines of the company, and was paid by the company to do this work under its orders; that he was especially and directly in charge and control of the tank and crane and spout and pumping station and all the appliances thereof at Cerulean Springs, and of the supplying of water to the engines, and was actually managing and controlling said tanks, pump, spout and appliances; that the company and Mitchell, as its agent and servant in charge of said tank, had carelessly, wrongfully and negligently placed the post, pillar and support supporting the spout and crane which was used in supplying the engine with water, dangerously and unnecessarily near to the track, making the position of same improper, defective and dangerous, because of its proximity to the track, and had negligently permitted the chains, spout and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the train, so as to endanger the lives of the employees engaged in discharging their duties; that by the negligence of the defendant company and Mitchell in placing the post, pillar and support so near the track, and by their negligence in suffering and permitting the support and connections of the tank to be in such condition as to put the spout in dangerous proximity to the train, the plaintiff was struck by the spout upon the head and injured." The petition also contained other allegations necessary in cases of this character. In due time the railroad company, a foreign corporation, filed its petition and bond for removal of the cause to the United States Circuit Court. This motion the trial court overruled. Upon a trial of the case, at the conclusion of the evidence for plaintiff, now appellant, the defendant Mitchell entered a motion for a peremptory instruction, which was sustained by the court, and thereupon the jury returned a verdict for Mitchell. When the action against Mitchell was terminated in this way, the defendant company renewed its motion for removal,

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and it was sustained by the court. Appellant complains of the action of the trial court in giving the peremptory instruction and in removing the cause.

The petition stated a good cause of action against both the defendants, and the court properly refused to transfer the action when the motion was first made. *I. C. R. R. v. Coley*, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370; *Pierce's Adm'r v. I. C. R. R.*, 86 S. W. 703, 27 Ky. Law Rep. 801. Whether the transfer was proper, upon the conclusion of the evidence for appellant, depends upon the question whether or not Mitchell was joined as defendant in good faith. The mere fact that the trial judge sustained a peremptory instruction on behalf of Mitchell is entitled to some weight, but is not in itself conclusive evidence that Mitchell was not joined in good faith, or that appellant failed to make out a case against Mitchell. To determine therefore whether or not the action of the trial court was proper, we will examine the evidence introduced by appellant, and determine from it whether or not the averments of the petition stating a good cause of action against Mitchell were sustained. The substance of the allegations against Mitchell are that he was directly in charge and control of and actually managed and controlled the tank, crane, spout, pumping station, and all appliances connected therewith, and that as agent and servant of the company he carelessly and negligently placed the pillars, supporting the spout and crane, dangerously and unnecessarily near the track, making the same improper, defective, and dangerous because of its proximity to the track; and that the company and Mitchell negligently permitted the chains, spout, and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the cars. The evidence for plaintiff was to the effect that Mitchell was in charge of the tank and pump of the defendant on the Evansville & Hopkinsville Division, which included the tank at Cerulean Springs, and hired the pumpers, and that the tank at Cerulean Springs was some two feet nearer the track than the tank at Princeton on the same line; that Mitchell was working under one Noles, and had been seen repairing the tanks and machinery attached thereto; that the water pipe from the tank was the instrument that struck the appellant and knocked him off the train; that it was Mitchell's duty to examine the tanks and pumps at each station, and keep them in running order; and that the pipe that struck appellant was improperly adjusted and hanging too far over the track. There was no evidence whatever tending to show that Mitchell had anything to do with erecting the tank or placing or adjusting any of the fixtures or appliances thereon; nor does the evidence disclose whether the pipe that struck appellant was so constructed that it hung too far over the track, or was negligently permitted to hang in that condition by some persons when using it; nor does the evidence show that Mitchell could have reconstructed the tank or placed it further from the track, or have supplied it with different pipes or appliances, or that he was furnished by the

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master with any other appliances than those in use, or that he had it in his power to do anything more than he had done. Mitchell was a subordinate employee of the railroad company, working under the superintendent or person who had charge of the tanks and pumping stations.

Assuming that it was the duty of Mitchell to keep these tanks and appliances in repair, and that the water pipe that struck appellant was hanging too low down, Mitchell could not be held liable to appellant, unless a servant such as Mitchell was is liable for nonfeasance, or for his failure to affirmatively take some action to remedy defects or dangerous appliances to which his attention may be directed. This precise question was before this court in *Cincinnati, New Orleans & Texas Pacific R. Co. v. Robinson*, 74 S. W. 1061, 25 Ky. Law Rep. 265, and it was there held that the petition having failed to show any cause of action against Robinson, the employee joined with the company, that it was proper to remove the case to the United States Circuit Court. In the case at bar, the evidence wholly fails to make out a case against Mitchell, and therefore the action of the trial judge in giving the peremptory instruction was proper. The petition for removal set out that Mitchell was joined as a defendant for the sole purpose, and with the fraudulent design, of preventing the transfer of the case to the United States Circuit Court, and that the allegations of the petition in respect to Mitchell were untrue, and could not be sustained by evidence; and, when the evidence on behalf of appellant disclosed a total failure to show any liability on the part of Mitchell, the conclusion remained that the allegations of the petition for removal were true.

In *Illinois Central R. Co. v. Coley*, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370, the engineer in charge of the train that injured plaintiff was joined as a defendant. A petition similar to the one in the case at bar was filed for removal, and overruled. On a trial, a verdict was rendered against the defendants. In discussing the question of removal, this court said: "If the engineer negligently ran the engine against the wagon in which appellee was riding and injured her, he is liable to her for her injuries. The fact that he did not own the engine, or that he was operating it in the service of the railroad company, makes him none the less liable for his personal wrong. If, in operating the engine, he was acting as agent of the railroad company, and his act was its act, then it is also responsible to her upon the principle that he who does an act by another does it himself." In that case the evidence justified the finding that the engineer was guilty of an affirmative act of negligence, and, although a subordinate employee, was jointly liable with his principal for his negligent conduct. The court further said: "If the plaintiff trifled with the court, and joined a defendant who is a resident of the state simply for the purpose of defeating the right of the other defendant to remove the case to the federal court, the court should, as soon as this is made apparent on the trial, dismiss the action as to the defendant fraudulently joined, with costs, and

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ACCIDENTS ON TRACK.

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Contributory Negligence.

Burden of proof. *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 609.

Plaintiff, when struck by street car, was guilty of contributory negligence as a matter of law, precluding recovery. *Garvick v. United Rys. & Elec. Co.* (Md.), 615.

Question of plaintiff's negligence in driving on street railway track was for the jury. *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 609.

Right of one driving along street railway track in daylight to suppose that, if a car is approaching from the rear, a proper lookout is maintained and that ordinary care will be exercised not to injure him. *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 609.

Walking on track without necessity. *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 573.

Error in instruction, in action for running street car against child, was cured by an instruction, that if the motorman failed, after he became aware of the peril of the child, to do all in his power with the means at hand to save the child, and that the death was the proximate cause of such failure, the motorman was guilty of wantonness, authorizing a verdict for plaintiff, though the child was guilty of contributory negligence. *Birmingham Ry. L. & P. Co. v. Jones* (Ala.), 568.

Failure of motorman of street car to ring the gong is not evidence of actionable negligence in injuring a pedestrian on the track, who knew of the car's approach. *Garvick v. United Rys. & Elec. Co.* (Md.), 615.

In action for injuries to plaintiff by collision between the wagon in which he was riding and a street car, the evidence required submission of defendant's negligence and plaintiff's contributory negligence to the jury. *Halloran v. Worcester Consol. St. Ry. Co.* (Mass.), 582.

In action for injuries to plaintiff while riding in a wagon, by collision with a street car, the burden was on plaintiff to show due care on his part and negligence on the part of the street car company. *Halloran v. Worcester Consol. St. Ry. Co.* (Mass.), 582.

Instruction as to the proximate cause was erroneous, for whatever additional injury to the traveler was due to the excess of speed of the street car was an injury caused by the company's negligence. *Bresee v. Los Angeles Traction Co.* (Cal.), 537.

Instruction, in action for running street car against child, which, after hypothesizing the failure of the motorman to do all that a prudent motorman would have done under the circumstance to

ACCIDENTS ON TRACK—Continued.

save the life of the child, fails to further hypothesize that the failure proximately caused the injury, is erroneous. *Birmingham Ry. L. & P. Co. v. Jones* (Ala.), 568.

Instruction submitting doctrine of last clear chance was not outside the issues, in action for injuries sustained in collision between plaintiff's vehicle and a street car. *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 609.

It was error to charge that, it was not negligence on the part of the motorman to assume that a person would not attempt to cross the track, it having been for the jury to determine whether the speed of the car was so great that he should have known persons might ignorantly attempt to cross so near as to make a collision probable. *Bresee v. Los Angeles Traction Co.* (Cal.), 537.

Lookout, trainmen not required to keep, for protection of persons traveling near track on thoroughfare which is not a public highway. *Alabama Great Southern R. Co. v. Fulton* (Ala.), 311.

Negligence of street railway company is not inferred from mere fact that car struck and injured pedestrian walking along track. *Garvick v. United Rys. & Elec. Co.* (Md.), 615.

Right of motorman to presume that pedestrian will leave track in time to avoid injury. *Garvick v. United Rys. & Elec. Co.* (Md.), 615.

Where motorman saw one driving a vehicle in the same direction turn on the track ahead of the car in order to pass a wagon, he was not at liberty to continue to proceed at a high speed without sounding the gong. *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 609.

ACT OF GOD.

See CARRIERS OF GOODS; COMMON CARRIERS.

AGENTS.

See CROSSINGS.

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See STOCK, INJURIES TO.

No presumption of negligence from fact of killing of dog by train. *Fowles v. Seaboard Air Line Ry.* (S. Car.), 510.

Signals at railroad crossing not for protection of dogs. *Fowles v. Seaboard Air Line Ry.* (S. Car.), 510.

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ARGUMENTS OF COUNSEL.

See TRIAL.

ASSAULTS.

See CARRIERS OF PASSENGERS.

ASSUMPTION OF RISK.

See LOGGING RAILROADS; MASTER AND SERVANT.

BAGGAGE.

Carrier must check baggage to point of destination, and cannot require the passenger to recheck at junctional point. *Sullivan v. Southern Ry.* (S. Car.), 669.

In action to recover for delay of baggage, an allegation that a party took his trunk to the baggage room in the evening and on the next morning bought a ticket and asked that the baggage be checked and was informed that it had been sent by mistake

BAGGAGE—Continued.

to another point, that it would be forwarded to the passenger's destination, but that it never was so delivered, does not show notice to the carrier that it would be subject to special damages in case of non-delivery. *Wehman v. Southern Ry. (S. Car.)*, 721.

In order to charge a railroad with liability for articles of merchandise accepted as baggage, it need not be shown that the agent of the railroad was expressly notified that the articles were merchandise. *Dahrooge v. Pere Marquette R. Co. (Mich.)*, 637.

Punitive damages were recoverable for refusal to check passenger's baggage. *Sullivan v. Southern Ry. (S. Car.)*, 669.

S. Car. Code, 1902, § 2166, prescribing penalty for refusing to check baggage, is not exclusive, and does prevent passenger from suing for damages. *Sullivan v. Southern Ry. (S. Car.)*, 669.

BAILMENT.

See NEGLIGENCE.

BIAS.

See JURORS.

BILLS OF LADING.

Bill of lading which station agent neglected to sign was evidence of the contract of shipment actually made, and, in absence of any evidence to contrary, established the terms of such contract. *Missouri, etc., Ry. Co. v. Patrick (C. C. A.)*, 483.

Estoppel of shipper to deny that bill of lading limiting liability was the contract, on the ground that his agent was unable to read it. *Missouri, etc., Ry. Co. v. Patrick (C. C. A.)*, 483.

It was competent for plaintiff to show that the delivering station was a prepay station, and that it was the custom of defendant's agent to deliver freight at such station to the owner or consignee without requiring production of bill of lading. *Bowdon v. Atlantic Coast Line Ry. Co. (Ala.)*, 735.

Freight receipt to which the name of a railway agent appears to have been signed by stencil is not admissible in evidence, without accompanying proof to show that he issued the receipt, or that its genuineness has been recognized by his principal. *Bell Bros. v. Western & A. R. Co. (Ga.)*, 751.

Louisiana Act No. 150, p. 193, of 1868, makes negotiable only receipts and bills of lading issued in accordance with its provisions, for property actually received for storage or other purposes. *Henderson v. Louisville & N. R. Co. (La.)*, 644.

Negotiability. *Roy & Roy v. Northern Pac. Ry. Co. (Wash.)*, 739.

Rule of commercial law not abrogated by certain statute of Louisiana, making it a felony for any person to sign or issue false receipts or bills of lading for property not actually received or delivered. *Henderson v. Louisville & N. R. Co. (La.)*, 644.

Transfer, rights of parties. *Henderson v. Louisville & N. R. Co. (La.)*, 644.

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See RAILROAD AID BONDS.

BURDEN OF PROOF.

See DEATH BY WRONGFUL ACT.

CAB-DRIVERS.

See NEGLIGENCE.

CARRIERS.

See BILLS OF LADING; COMMON CARRIERS; CONSTITUTIONAL LAW; INTERSTATE COMMERCE.

CARRIERS OF GOODS.

Buyer refusing to receive goods on their arrival within reasonable time, carrier not guilty of conversion in complying with seller's orders to ship goods back to him. *Stafsky v. Southern Ry. Co.* (Ala.), 86.

Common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause, except only the act of God or the public enemy. *Wabash R. Co. v. Sharpe* (Neb.), 491.

Consignee, by declining to receive a delayed shipment from the carrier, cannot convert the carrier into a tort-feasor and hold him liable for the value of the property. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Contract of shipment, neither bill of lading nor any other writing is necessary to constitute. *Missouri, etc., Ry. Co. v. Patrick* (C. C. A.), 483.

Damages.

Certain information did not give the carrier notice that plaintiff had a contract which would be forfeited in the event of a failure to deliver certain well pipe promptly. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

In action against carrier for damages to property, plaintiff could not recover for any injury to the property or depreciation in its value after it had arrived at its destination and he had refused to accept it. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Measure of damages where goods are injured. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Mere delivery of iron pipe for the boring of a well to a carrier for transportation was insufficient of itself to give notice to the carrier of the existence of a time contract between the consignee and the owner of the well which would probably be affected by delay in the delivery of the material. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Notice to carrier after goods have been shipped, of circumstances which render special damages a probable consequence of delay, does not affect the original contract so as to render the carrier liable for such damages, though the subsequent delay is unreasonable. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Where a carrier was guilty of negligent delay in the delivery of materials for use in the performance of a well-drilling contract, but the carrier never had in its possession a part of the equipment, it was only liable for the usable rental value of the material and appliance which it had in its keeping. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Where a consignee of materials for the drilling of a well was compelled to purchase new materials because of the carrier's delay in delivering the materials shipped, and on tender of delivery the consignee refused to receive the delayed shipment, he could not recover the difference between the rejected materials and the amount paid for the new. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Where railroad, when sued for loss of freight, pleaded a limitation of its liability, but did not tender or offer to pay the amount due upon its own construction of the contract, and relying on another defense, contested the case and carried it through several courts, on a final decree sustaining its limitation, the appellate court will affirm the judgment for the reduced amount on a remittitur of the excess by plaintiff. *Missouri, etc., Ry. Co. v. Patrick* (C. C. A.), 483.

Common carrier is responsible for injury to goods where they

CARRIERS OF GOODS—Continued.

were exposed to injury by its inexcusable detention, and the carrier cannot, in such case, plead the act of God as a defense. *Wabash R. Co. v. Sharpe* (Neb.), 491.

Estoppel of consignee to sue carrier for conversion, where carrier, in reliance on consignee's denial of ownership, returned goods to shipper. *Stafsky v. Southern Ry. Co.* (Ala.), 86.

Limiting Liability.

A certain construction of a contract of shipment, which tended to deprive the carrier of the benefit of a stipulation purporting to limit its liability, did not deprive the carrier of the equal protection of the laws of the United States, etc., so as to give the Supreme Court jurisdiction of an appeal. *Phoenix Powder Mfg. Co. v. Wabash R. Co.* (Mo.), 487.

Burden of proving special agreement. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Express or implied contract stipulation with shipper essential. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

No presumption obtained that shipper knew a reduced rate was charged because the printed receipt contained a clause limiting the road's liability, so as to exonerate the carrier from liability for loss of the freight through negligence, where the bill of lading was silent as to the rate, though the railroad had filed with the Interstate Commerce Commission a printed schedule of tariffs, etc. *Phoenix Powder Mfg. Co. v. Wabash R. Co.* (Mo.), 487.

Requisites of agreement. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Validity of contract providing for an agreed valuation of the goods. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

When a consignee brings suit to recover damages for a neglect of legal duty arising under a special contract made in his behalf, the consignee is not at liberty to challenge the authority of the consignor to make the shipment under such contract. *Bell Bros. v. Western & A. R. Co.* (Ga.), 751.

CARRIERS OF LIVE STOCK.

See CARRIERS OF PASSENGERS.

Breach of contract for transportation of live stock, recovery could be had on count of complaint in Code form, though it appeared that shipment was made under bills of lading containing special stipulations. *Webb v. Southern Ry. Co.* (Ala.), 26.

Carrier not relieved for breach of duty to unload stock for rest, water, and food, as required by Rev. St. U. S. § 4383, by contract provision requiring shipper to unload at his own risk at any place where his stock may be unloaded for any purpose. *Reynolds v. Great Northern Ry. Co.* (Wash.), 70.

Claim for damages was made within time specified in contract, where shipper within such time made an oral claim to a latter agent to whom he had been referred by former agent, although a requested written claim was not furnished until after the specified time. *Reynolds v. Great Northern Ry. Co.* (Wash.), 70.

Contract provision that shipper should unload at his own risk construed as made with reference to unloading where there were proper facilities, where he did not know that there were no yards at destination for unloading. *Reynolds v. Great Northern Ry. Co.* (Wash.), 70.

Conversion of freight, unauthorized delivery constituted. *Webb v. Southern Ry. Co.* (Ala.), 26.

Damages.

Loss of weight and market value during delay were recoverable

CARRIERS OF LIVE STOCK—Continued.

- under count in Code form, in absence of stipulation in contract for different measure of damages. *Webb v. Southern Ry. Co. (Ala.)*, 26.
- Misdelivery, plaintiff entitled to recover sum he was required to pay for feeding hogs before he could regain possession of them. *Webb v. Southern Ry. Co. (Ala.)*, 26.
- Misdelivery, plaintiff not entitled to recover expense incurred by him on trip to destination of hogs, made in order to recover them. *Webb v. Southern Ry. Co. (Ala.)*, 26.
- Misdelivery, provision of contract fixing measure of damages was not applicable. *Webb v. Southern Ry. Co. (Ala.)*, 26.
- Duty of carrier to deliver stock to consignee in inclosed yards, convenient to place of unloading. *Reynolds v. Great Northern Ry. Co. (Wash.)*, 70.

Limiting Liability.

- Exemption from liability for loss caused by violation of federal statute forbidding confinement in cars for longer period than 28 consecutive hours without unloading, validity of contract. *Reynolds v. Great Northern Ry. Co. (Wash.)*, 70.
- Misdelivery, carrier not relieved from liability by failure of shipper to accompany stock and unload, as provided by contract. *Webb v. Southern Ry. Co. (Ala.)*, 26.
- Misdelivery, contract provision requiring shipper to give certain notice of any claim for damages had no application. *Webb v. Southern Ry. Co. (Ala.)*, 26.
- Misdelivery, it was immaterial to carrier's liability that it was entitled to retain stock until freight was paid. *Webb v. Southern Ry. Co. (Ala.)*, 26.
- Notice of claim was sufficient to support claim for cost of recovering lost cattle and depreciation in their value. *Reynolds v. Great Northern Ry. Co. (Wash.)*, 70.
- Violation of federal statute forbidding the confinement of stock in cars for longer period than 28 consecutive hours without unloading, sufficiency of complaint to show negligence per se. *Reynolds v. Great Northern Ry. Co. (Wash.)*, 70.

CARRIERS OF PASSENGERS.

See BAGGAGE; CONSTITUTIONAL LAW; DAMAGES; EVIDENCE; FEDERAL COURTS; LEASES AND RUNNING POWERS; SLEEPING CAR COMPANIES; TICKETS AND FARES; TRIAL.

Assaults.

- Assault on passenger by third person, liability of carrier. *Brown v. Chicago R. I. & P. Ry. Co. (C. C. A.)*, 1.
- Conductor was not justified in knocking person, whom he had ejected for refusal to pay fare, from car platform. *Lindsay v. Wabash Ry. Co. (Mich.)*, 62.
- Declaration did not warrant recovery for negligence of conductor in failing to discover plaintiff's mental derangement. *Lindsay v. Wabash Ry. Co. (Mich.)*, 62.
- Declaration in trespass vi et armis justified proof of the commission of an assault by a railway conductor while preventing a person from boarding a train after he had been ejected for his refusal to pay fare; and the proof might show justification. *Lindsay v. Wabash Ry. Co. (Mich.)*, 62.
- Rape of passenger by brakeman, absence of complaint did not disprove charge, but the jury were bound to consider all the circumstances. *Garvik v. Burlington, etc., Ry. Co. (Iowa)*, 496.
- Rape of passenger by brakeman, evidence held sufficient. *Garvik v. Burlington, etc., Ry. Co. (Iowa)*, 496.

CARRIERS OF PASSENGERS—Continued.

- Rape of passenger by brakeman, railroad liable for. *Garvik v. Burlington, etc., Ry. Co. (Iowa)*, 496.
- Carrier was not bound to have car vestibuled, but, having done so, it could not with impunity lead passengers to believe that the doors of the vestibule would be kept closed between stations, and then negligently leave them open, without incurring liability to a passenger injured thereby. *Crandall v. Minneapolis, etc., Ry. Co. (Minn.)*, 478.
- Conductor without implied authority to waive contract provision requiring shipper of stock to ride in caboose. *Illinois Cent. R. Co. v. Jennings (Ill.)*, 15.
- Contributory Negligence.**
- Alighting from moving street car. *Joyce v. Los Angeles Ry. Co. (Cal.)*, 66.
- Alighting from moving train. *Baltimore & O. S. W. R. Co. v. Mullen (Ill.)*, 6.
- Alighting passenger injured, fact that it was dark, and he felt no motion of the train and believed it had stopped, and got off at place pointed out to him by depot officials, must be considered by jury. *Baltimore & O. S. W. R. Co. v. Mullen (Ill.)*, 6.
- Boarding crowded car when urged by conductor to crowd on, question for jury. *Alton Light & Traction Co. v. Oliver (Ill.)*, 33.
- Leaving seat and stepping to side of slowly moving open street car. *Davis v. Camden G. & W. Ry. Co. (N. J.)*, 665.
- Passenger descending to lower step of street car and making ready to alight when car should stop. *Wabash River Traction Co. v. Baker (Ind.)*, 493.
- Passenger killed in collision with another car while riding on running board. *Abel v. Northampton Traction Co. (Pa.)*, 80.
- Passenger passing through cars, by conductor and porter, in search of water, and stepping off unlighted and unguarded back platform of rear car, recovery precluded. *Hunter v. Atlantic Coast Line R. Co. (S. Car.)*, 55.
- Passenger standing on step of street car injured by reason of sudden movement of car. *Joyce v. Los Angeles Ry. Co. (Cal.)*, 66.
- Question for jury in action for injuries sustained by passenger when alighting from street car. *Indiana Union Traction Co. v. Jacobs (Ind.)*, 653.
- Rape of passenger by brakeman, proper to refuse to submit question of contributory negligence, in action against railroad. *Garvik v. Burlington, etc., Ry. Co. (Iowa)*, 496.
- Right of street car passenger to assume that car has stopped at safe place. *Indiana Union Traction Co. v. Jacobs (Ind.)*, 653.
- Right of street car passenger to assume that car will not be moved without notice to him. *Davis v. Camden G. & W. Ry. Co. (N. J.)*, 665.
- Rule prohibiting passengers from riding on front platform of street car, effect of passenger's violation of. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.
- Shipper of stock must ride in caboose while train is moving, according to contract requirement. *Illinois Cent. R. Co. v. Jennings (Ill.)*, 15.
- Taking position near track on crowded platform. *Cousineau v. Muskegon T. & L. Co. (Mich.)*, 659.
- Where passenger knew that on certain street cars there was a notice stating that passengers choosing to ride on the front platform did so at their own risk, it was not necessary for the company, in order to defeat an action by the passenger for injuries received while alighting from the front platform of

CARRIERS OF PASSENGERS—Continued.

a car, to prove that he also had seen such notice on the particular car on which he was riding. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.

Damages.

Evidence that a train was run over a trestle at 50 miles an hour when the schedule time was 33, and that an accident resulted, may support punitive damages in an action for wrongful death of a passenger. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

Excessive verdict for ejection of passenger. *Southern Ry. Co. in Kentucky v. Hawkins (Ky.)*, 21.

Extent of carrier's liability on account of its station agent's misrepresentations to prospective passenger as to the best route to her destination. *St. Louis, etc., R. Co. v. White (Tex.)*, 796.

Instruction in relation to worldly circumstances of the parties to an action for insulting passenger required the granting of a new trial. *Georgia Ry. & Electric Co. v. Baker (Ga.)*, 789.

Loss of time and expense incurred not recoverable, in action for ejection of passenger, in absence of appropriate pleading and proof. *Southern Ry. Co. in Kentucky v. Hawkins (Ky.)*, 21.

Punitive damages, when not recoverable for ejection of passenger. *Southern Ry. Co. in Kentucky v. Hawkins (Ky.)*, 21.

Rape of passenger by brakeman resulting in pregnancy, instruction did not warrant an inference that damage might be awarded for time lost in caring for the child. *Garvick v. Burlington, etc., Ry. Co. (Iowa)*, 496.

Rape of passenger by brakeman, verdict was excessive. *Garvick v. Burlington, etc., Ry. Co. (Iowa)*, 496.

Threat to expel passenger from street car, who presented a transfer which was defective through no fault of his. *Georgia Ry. & Electric Co. v. Baker (Ga.)*, 789.

Degree of Care.

Care required of carrier to protect its passengers from employees, passengers and strangers. *St. Louis, etc., Ry. Co. v. Hatch (Tenn.)*, 782.

Evidence that a railroad furnished its road, ran its trains, and inspected its trestles in the manner which is generally believed to be safe and prudent should go to the jury on the question of due care. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

In action by passenger for injuries sustained by the alleged negligence of a carrier, the Federal Circuit Court of Appeals is governed by the law as declared by the United States Supreme Court with reference to the measure of care required of the carrier. *Southern Pac. Co. v. Cavin (C. C. A.)*, 803.

Instruction requiring higher degree from street railways than steam railroads, and stating that carrier's duty was not discharged until it had set passenger down safely, etc., was not commendable in its opening statement, but was not erroneous. *Wabash River Traction Co. v. Baker (Ind.)*, 493.

Railroad company, though not an insurer of the lives of its passengers, is liable for injuries to a passenger by unsound timber in a trestle or by any other defect therein. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

Duty of carrier to protect passenger from indignities, as against a fellow passenger. *Franklin v. Atlanta, etc., Ry. Co. (S. Car.)*, 563.

Duty to give passenger time to alight. *Baltimore & O. S. W. R. Co. v. Mullen (Ill.)*, 6.

Duty to helpless passenger without attendant. *Illinois Cent. R. Co. v. Allen (Ky.)*, 49.

CARRIERS OF PASSENGERS—Continued.**Ejection.**

In order to justify ejection and arrest of passenger for violation of separate coach law, the carrier must have itself complied with the law. *Waldauer v. Vicksburg Ry. & Light Co. (Miss.)*, 504.

Invalid ticket and refusal to pay fare, conductor not guilty of a tort in expelling passenger without using unnecessary force. *Southern Ry. Co. v. Hawkins (Ky.)*, 21.

No fatal variance where petition alleged purchase of ticket and wrongful and willful ejection of passenger, and proof showed the ticket had been so punched, through negligence of ticket agent or of a prior conductor, as to render it valueless for use at time plaintiff was ejected. *Southern Ry. Co. v. Hawkins (Ky.)*, 21.

Passenger, ejected from car for refusing to pay fare other than by certain transfer ticket, could recover damages for the tort, and should not be restricted to damages for breach of the contract to carry him. *Cleveland City Ry. Co. v. Conner (Ohio)*, 649.

Threat by conductor of second car to expel a passenger on account of a mistake in the transfer slips is a legal wrong, giving the passenger a right of action against the company, though there is nothing insulting in the words or manner of the conductor. *Georgia Ry. & Electric Co. v. Baker (Ga.)*, 789.

Evidence.

Dangerous speed of train alleged, evidence of condition of cars after collision was admissible. *Elgin, A. & S. Traction Co. v. Wilson (Ill.)*, 37.

Declarations of fellow passengers of ejected passenger, that he was a "beat and bum," made as he walked out of car behind conductor, were incompetent. *Southern Ry. Co. in Kentucky v. Hawkins (Ky.)*, 21.

Evidence as to effect of collision on the other passengers was immaterial. *Abel v. Northampton Traction Co. (Pa.)*, 80.

Exclusion of evidence proving statement made by motorman was immaterial, as there was failure to show violation of any duty owed by the street railway company to the passenger. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.

Failure of plaintiff to make a statement before he was put off car, effect of. *Cleveland City Ry. Co. v. Conner (Ohio)*, 649.

Injured passenger's uncorroborated testimony was sufficient to sustain verdict in her favor. *Illinois Cent. R. Co. v. Colly (Ky.)*, 251.

Of custom to permit passengers of both races to occupy the back platform of defendants' street cars, in action for causing passenger's arrest for violation of separate coach law. *Waldauer v. Vicksburg Ry. & Light Co. (Miss.)*, 504.

Proof of certain statement of motorman was admissible in support of passenger's claim that he was thrown off by the negligent jerk of the car. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.

Proof of rule to prevent passengers from riding on front platform of street car. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.

Witness, in action for death of passenger, in describing the wreck, may state what injuries he received, and that another train ran into the wreck. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

Indignities received by a passenger from outsiders, sufficiency of evidence. *St. Louis, etc., Ry. Co. v. Hatch (Tenn.)*, 782.

In respect to failure to provide a platform in the street, and in

CARRIERS OF PASSENGERS—Continued.

running the car beyond the usual place, the complaint showed no cause of action, but the remaining allegations constituted a showing of negligence, in an action for injury to a street car passenger, caused by alleged failure to provide a suitable place to alight. *Indiana Union Traction Co. v. Jacobs* (Ind.), 653.

Insufficiency of evidence to prove actionable negligence where person, who had told the conductor, in a saloon, that he intended to travel on his train, was injured while attempting to board it after it had started, and claimed that accident was caused by jerk of car. *Southern Ry. Co. v. Johnson* (Ala.), 58.

Invitation to passengers to alight, sufficiency of. *Tilden v. Rhode Island Co.* (R. I.), 809.

Joint liability of carriers where passenger of one of them is injured by reason of collision between their respective cars. *Louisville Ry. Co. v. Blum* (Ky.), 44.

Limiting Liability.

Where evidence showed that husband of plaintiff's intestate agreed to go to a certain point to testify for a railroad company, on condition that it furnished transportation for his wife, if the pass was issued for a consideration, the company is not relieved of liability for negligent killing of the wife by the stipulation on the pass to that effect. *Nickles v. Seaboard Air Line Ry.* (S. Car.), 755.

Main-track switch not locked or guarded, question for jury, whether actionable negligence. *Elgin, A. & S. Traction Co. v. Wilson* (Ill.), 37.

Negligence of street railway, in not making adequate provisions by way of barriers and policemen to guard crowded platform near tracks, at carriers amusement park, was question for jury. *Cousineau v. Muskegon, T. & L. Co.* (Mich.), 659.

Notice to street car conductor of passenger's desire to alight, sufficiency. *Joyce v. Los Angeles Ry. Co.* (Cal.), 66.

Passenger riding in vestibule, jostled by porter and caused to fall off train, carrier liable. *Chicago, etc., Ry. Co. v. Ferguson* (Kan.), 684.

Passenger thrown to floor of car by sudden jar, error in instruction, in failing to require finding of negligence in unnecessary and violent striking of the car as alleged, was cured by another instruction. *Illinois Cent. R. Co. v. Colly* (Ky.), 251.

Passenger thrown to floor of car by sudden jar, instruction authorizing a finding for defendant if the coupling was made in a way that was customary and incidental to railroading, without defining the degree of care with which it should have been done, was too favorable to defendant. *Illinois Cent. R. Co. v. Colly* (Ky.), 251.

Passenger thrown to floor of car by sudden jar, plaintiff's uncorroborated testimony required denial of peremptory instruction for defendant. *Illinois Cent. R. Co. v. Colly* (Ky.), 251.

Presumption of Negligence.

Southern Pac. Co. v. Cavin (C. C. A.), 803.

Collision between trains, evidence of warranted recovery for injuries to passenger, in absence of evidence of contributory negligence. *Elgin, A. & S. Traction Co. v. Wilson* (Ill.), 37.

Derailment causing injury to passenger. *Illinois Cent. R. Co. v. Porter* (Tenn.), 686.

Injury to alighting passenger. *Tilden v. Rhode Island Co.* (R. I.), 809.

Passenger riding on running board from necessity killed by collision with another street car. *Abel v. Northampton Traction Co.* (Pa.), 80.

Prima facie case of negligence where street car passenger was

CARRIERS OF PASSENGERS—Continued.

- injured by reason of sudden movement of car while she was in act of alighting. *Joyce v. Los Angeles Ry. Co. (Cal.)*, 66.
- Right to rebut. *Illinois Cent. R. Co. v. Porter (Tenn.)*, 686.
- Question of carrier's negligence was for the jury, in absence of proof of rules relating to passengers riding on the platforms, in action for injuries sustained by passenger in attempting to alight from street car. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.
- Right to refuse to accept blind man as passenger. *Illinois Cent. R. Co. v. Allen (Ky.)*, 49.
- Separate coach law, what is sufficient compliance with. *Waldauer v. Vicksburg Ry. & Light Co. (Miss.)*, 504.
- Speed of street, duty to regulate where passengers are compelled to ride on car platform. *Alton Light & Traction Co. v. Oliver (Ill.)*, 33.
- Speed of train as negligence. *Illinois Cent. R. Co. v. Porter (Tenn.)*, 686.
- Sufficiency of evidence of negligence where derailment of train caused injury to passenger. *Illinois Cent. R. Co. v. Porter (Tenn.)*, 686.
- Sufficiency of evidence that car was operated by defendant. *Indiana Union Traction Co. v. Jacobs (Ind.)*, 653.
- Sufficiency of petition, under Mo. Rev. St. 1899, § 2864, in action for death of passenger, it not having been essential to allege the particular acts of any particular servant or employee which occasioned the collision. *Anderson v. Missouri Pac. Ry. Co. (Mo.)*, 696.
- Switch, not locked or guarded, thrown by third person, liability of carrier for injury to passenger. *Elgin, A. & S. Traction Co. v. Wilson (Ill.)*, 37.
- Tort of third person causing injury to passenger, carrier not relieved from liability for its failure to use due care to prevent such person from having opportunity to commit act. *Elgin, A. & S. Traction Co. v. Wilson (Ill.)*, 37.
- Vestibule doors, sufficiency of evidence of negligence in leaving them open. *Crandall v. Minneapolis, etc., Ry. Co. (Minn.)*, 478.
- Waiver by conductor of contract provision requiring shipper of stock to ride in caboose, what must be shown to establish, in absence of evidence of express authority on part of conductor. *Illinois Cent. R. Co. v. Jennings (Ill.)*, 15.
- Waiver of provision of contract requiring shipper to ride in caboose, question for jury whether conductor's invitation to ride on engine was. *Illinois Cent. R. Co. v. Jennings (Ill.)*, 15.
- Waiver of rule to prevent passengers from riding on front platform of street car. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.
- When it is not negligence to open side door and floor door of vestibuled coach, and leave them open till station is reached. *Union Pac. R. Co. v. Brown (Kan.)*, 448.
- Where the employees of a railway and a sleeping car company have been negligent in leaving the car for a long period, and in failing to answer bells, they cannot escape liability for indignities to passengers, on the ground that there was no reason for supposing that any such wrong would be committed. *St. Louis, etc., Ry. Co. v. Hatch (Tenn.)*, 782.

Who Are Passengers.

Court properly confined plaintiff's recovery to section 2864 Mo. Rev. St. 1899, as the deceased brakeman, for whose death the action was brought, was a servant engaged with others in operating and managing the train. *Anderson v. Missouri Pac. Ry. Co. (Mo.)*, 696.

If a mistake is made by the conductor of the first car issuing a

CARRIERS OF PASSENGERS—Continued.

transfer, and the passenger presents the transfer to the conductor of the second car and gives a reasonable explanation of the mistake of the conductor of the first car, the conductor of the second must at his peril determine whether the passenger is entitled to ride upon the transfer, notwithstanding it does not upon its face show such right. *Georgia Ry. & Electric Co. v. Baker* (Ga.), 789.

Instruction sufficiently required the jury to find that deceased was a passenger at the time of the accident. *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 696.

It was not essential, in order to authorize the submission of the case to the jury, to show by positive or direct evidence that deceased was a passenger at the time of the collision, or that it was his purpose to continue his journey. *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 696.

Mail clerk. *Southern Pac. Co. v. Cavin* (C. C. A.), 803.

One riding on ticket procured at reduced rate by false representation to the effect that she was a student at a certain school was not a passenger. *Fitzmaurice v. New York, N. H. & H. R. R.* (Mass.), 635.

Passenger who has purchased ticket to certain point, but who, on reaching such point, decides to go further, need not, in order to preserve his protection as a passenger, alight from the train and then re-enter, nor expressly notify the conductor of his purpose to continue his journey. *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 696.

Person injured while attempting to board moving train. *Southern Ry. Co. v. Johnson* (Ala.), 58.

Railway postal clerks. *Illinois Cent. R. Co. v. Porter* (Tenn.), 686.

Right to ride on street car to which passenger had been transferred was in no sense a gratuity. *Georgia Ry. & Electric Co. v. Baker* (Ga.), 789.

Shipper of stock required to ride in caboose. *Illinois Cent. R. Co. v. Jennings* (Ill.), 15.

Where deceased, at the time of a collision, was in the coach used by defendant railroad for the purpose of transporting passengers, his residence being at a distant point where his family was, and the train having started to carry such passengers as were on to other points of destination along its line, the presumption was that deceased was lawfully in the coach. *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 696.

CHILDREN.

See NEGLIGENCE.

Burden of proving exercise of proper care by motorman to avoid injuring child seen near track. *Jacksonville Electric Co. v. Adams* (Fla.), 295.

Care required of motorman to prevent injury to child seen near track. *Jacksonville Electric Co. v. Adams* (Fla.), 295.

Care required of person stacking building material in street to prevent stack from being dangerous to children. *Louisville Ry. Co. v. Esselman* (Ky.), 627.

Child injured by reason of its own act in setting fire to powder, while trespassing in a secluded part of defendant's premises, certain instruction as to defendant's duties and rights with respect to storing and keeping powder was proper. *Chambers v. Milner Coal & Ry. Co.* (Ala.), 277.

Child injured by reason of its own act in setting fire to powder, while trespassing in a secluded part of defendant's premises, no recovery on ground of willful, wanton, or reckless conduct. *Chambers v. Milner Coal & Ry. Co.* (Ala.), 277.

CHILDREN—Continued.**Contributory Negligence.**

Act of ten-year-old child, in crossing track in front of street car, could hardly be regarded otherwise than a result of a sudden, unthinking impulse, or of a reckless daring. *Colomb v. Portland & B. St. Ry. (Me.)*, 293.

Care required of child for its own protection. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Care required of child, for its own protection, while playing on building material stacked in street. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Care required of infant for its own safety. *Colomb v. Portland & B. St. Ry. (Me.)*, 293.

Child between 7 and 14 years of age is prima facie incapable of exercising judgment. *Birmingham Ry., L. & P. Co. v. Jones (Ala.)*, 568.

Instruction, in action for death of ten-year-old child, that, if the jury believe he was of sufficient intelligence to know the danger, verdict should be for defendant, was proper, where, had an adult acted as he did, he would have been guilty of contributory negligence. *Chambers v. Milner Coal & Ry. Co. (Ala.)*, 277.

Mere capacity of child under 14 years of age to know danger is not necessarily sufficient to make him guilty of contributory negligence in doing a thing which would be negligence in an adult. *Birmingham Ry., L. & P. Co. v. Jones (Ala.)*, 568.

Negligence of parents, in permitting four-year-old boy to go alone upon streets, was not imputable to him. *Jacksonville Electric Co. v. Adams (Fla.)*, 295.

Overruling of demurrers to pleas of contributory negligence, in an action for death of child, was harmless, plaintiff having got the benefit of the principle claimed as to necessity of pleading and proving requisite intelligence of the child in the charge. *Chambers v. Milner Coal & Ry. Co. (Ala.)*, 277.

Damages.

In action by father as next friend for personal injuries to his child, an instruction authorizing verdict for permanent impairment of the child's earning capacity and for medical attendance is not erroneous, the father being estopped thereby from asserting a claim for loss of services during the infancy of the child and for medical expenses. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Parents of infants are not entitled to recover damages for mental pain and anguish occasioned by the mutilation of the dead body of such infant. *Long v. Chicago, R. I. & P. Ry. Co. (Okl.)*, 589.

Demurrers to pleas setting up contributory negligence, in action by an administratrix for death of child, on the ground that they do not aver that "plaintiff" had sufficient discretion, are properly overruled. *Chambers v. Milner Coal & Ry. Co. (Ala.)*, 277.

Liability for injury to child sustained on attractive and dangerous premises. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Ordinances of city, permitting an owner engaged in constructing a building to appropriate a part of the adjacent street for the storage of materials, does not relieve the owner from the exercise of such ordinary care in placing the material as may be required by a due regard for the safety of children in the habit of playing in the street. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Verdict for person constructing building, and stacking iron beams in street, in action for injuries to child, was properly set aside as against the evidence. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

CARRIERS OF GOODS.

Buyer refusing to receive goods on their arrival within reasonable time, carrier not guilty of conversion in complying with seller's orders to ship goods back to him. *Stafsky v. Southern Ry. Co.* (Ala.), 86.

Common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause, except only the act of God or the public enemy. *Wabash R. Co. v. Sharpe* (Neb.), 491.

Consignee, by declining to receive a delayed shipment from the carrier, cannot convert the carrier into a tort-feasor and hold him liable for the value of the property. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Contract of shipment, neither bill of lading nor any other writing is necessary to constitute. *Missouri, etc., Ry. Co. v. Patrick* (C. C. A.), 483.

Damages.

Certain information did not give the carrier notice that plaintiff had a contract which would be forfeited in the event of a failure to deliver certain well pipe promptly. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

In action against carrier for damages to property, plaintiff could not recover for any injury to the property or depreciation in its value after it had arrived at its destination and he had refused to accept it. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Measure of damages where goods are injured. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Mere delivery of iron pipe for the boring of a well to a carrier for transportation was insufficient of itself to give notice to the carrier of the existence of a time contract between the consignee and the owner of the well which would probably be affected by delay in the delivery of the material. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Notice to carrier after goods have been shipped, of circumstances which render special damages a probable consequence of delay, does not affect the original contract so as to render the carrier liable for such damages, though the subsequent delay is unreasonable. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Where a carrier was guilty of negligent delay in the delivery of materials for use in the performance of a well-drilling contract, but the carrier never had in its possession a part of the equipment, it was only liable for the usable rental value of the material and appliance which it had in its keeping. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Where a consignee of materials for the drilling of a well was compelled to purchase new materials because of the carrier's delay in delivering the materials shipped, and on tender of delivery the consignee refused to receive the delayed shipment, he could not recover the difference between the rejected materials and the amount paid for the new. *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 727.

Where railroad, when sued for loss of freight, pleaded a limitation of its liability, but did not tender or offer to pay the amount due upon its own construction of the contract, and relying on another defense, contested the case and carried it through several courts, on a final decree sustaining its limitation, the appellate court will affirm the judgment for the reduced amount on a remittitur of the excess by plaintiff. *Missouri, etc., Ry. Co. v. Patrick* (C. C. A.), 483.

Common carrier is responsible for injury to goods where they

CARRIERS OF GOODS—Continued.

were exposed to injury by its inexcusable detention, and the carrier cannot, in such case, plead the act of God as a defense. *Wabash R. Co. v. Sharpe* (Neb.), 491.

Estoppel of consignee to sue carrier for conversion, where carrier, in reliance on consignee's denial of ownership, returned goods to shipper. *Stafsky v. Southern Ry. Co.* (Ala.), 86.

Limiting Liability.

A certain construction of a contract of shipment, which tended to deprive the carrier of the benefit of a stipulation purporting to limit its liability, did not deprive the carrier of the equal protection of the laws of the United States, etc., so as to give the Supreme Court jurisdiction of an appeal. *Phoenix Powder Mfg. Co. v. Wabash R. Co.* (Mo.), 487.

Burden of proving special agreement. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Express or implied contract stipulation with shipper essential. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

No presumption obtained that shipper knew a reduced rate was charged because the printed receipt contained a clause limiting the road's liability, so as to exonerate the carrier from liability for loss of the freight through negligence, where the bill of lading was silent as to the rate, though the railroad had filed with the Interstate Commerce Commission a printed schedule of tariffs, etc. *Phoenix Powder Mfg. Co. v. Wabash R. Co.* (Mo.), 487.

Requisites of agreement. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Validity of contract providing for an agreed valuation of the goods. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

When a consignee brings suit to recover damages for a neglect of legal duty arising under a special contract made in his behalf, the consignee is not at liberty to challenge the authority of the consignor to make the shipment under such contract. *Bell Bros. v. Western & A. R. Co.* (Ga.), 751.

CARRIERS OF LIVE STOCK.

See CARRIERS OF PASSENGERS.

Breach of contract for transportation of live stock, recovery could be had on count of complaint in Code form, though it appeared that shipment was made under bills of lading containing special stipulations. *Webb v. Southern Ry. Co.* (Ala.), 26.

Carrier not relieved for breach of duty to unload stock for rest, water, and food, as required by Rev. St. U. S. § 4383, by contract provision requiring shipper to unload at his own risk at any place where his stock may be unloaded for any purpose. *Reynolds v. Great Northern Ry. Co.* (Wash.), 70.

Claim for damages was made within time specified in contract, where shipper within such time made an oral claim to a latter agent to whom he had been referred by former agent, although a requested written claim was not furnished until after the specified time. *Reynolds v. Great Northern Ry. Co.* (Wash.), 70.

Contract provision that shipper should unload at his own risk construed as made with reference to unloading where there were proper facilities, where he did not know that there were no yards at destination for unloading. *Reynolds v. Great Northern Ry. Co.* (Wash.), 70.

Conversion of freight, unauthorized delivery constituted. *Webb v. Southern Ry. Co.* (Ala.), 26.

Damages.

Loss of weight and market value during delay were recoverable

CARRIERS OF LIVE STOCK—Continued.

under count in Code form, in absence of stipulation in contract for different measure of damages. *Webb v. Southern Ry. Co. (Ala.)*, 26.

Misdelivery, plaintiff entitled to recover sum he was required to pay for feeding hogs before he could regain possession of them. *Webb v. Southern Ry. Co. (Ala.)*, 26.

Misdelivery, plaintiff not entitled to recover expense incurred by him on trip to destination of hogs, made in order to recover them. *Webb v. Southern Ry. Co. (Ala.)*, 26.

Misdelivery, provision of contract fixing measure of damages was not applicable. *Webb v. Southern Ry. Co. (Ala.)*, 26.

Duty of carrier to deliver stock to consignee in inclosed yards, convenient to place of unloading. *Reynolds v. Great Northern Ry. Co. (Wash.)*, 70.

Limiting Liability.

Exemption from liability for loss caused by violation of federal statute forbidding confinement in cars for longer period than 28 consecutive hours without unloading, validity of contract. *Reynolds v. Great Northern Ry. Co. (Wash.)*, 70.

Misdelivery, carrier not relieved from liability by failure of shipper to accompany stock and unload, as provided by contract. *Webb v. Southern Ry. Co. (Ala.)*, 26.

Misdelivery, contract provision requiring shipper to give certain notice of any claim for damages had no application. *Webb v. Southern Ry. Co. (Ala.)*, 26.

Misdelivery, it was immaterial to carrier's liability that it was entitled to retain stock until freight was paid. *Webb v. Southern Ry. Co. (Ala.)*, 26.

Notice of claim was sufficient to support claim for cost of recovering lost cattle and depreciation in their value. *Reynolds v. Great Northern Ry. Co. (Wash.)*, 70.

Violation of federal statute forbidding the confinement of stock in cars for longer period than 28 consecutive hours without unloading, sufficiency of complaint to show negligence per se. *Reynolds v. Great Northern Ry. Co. (Wash.)*, 70.

CARRIERS OF PASSENGERS.

See BAGGAGE; CONSTITUTIONAL LAW; DAMAGES; EVIDENCE; FEDERAL COURTS; LEASES AND RUNNING POWERS; SLEEPING CAR COMPANIES; TICKETS AND FARES; TRIAL.

Assaults.

Assault on passenger by third person, liability of carrier. *Brown v. Chicago R. I. & P. Ry. Co. (C. C. A.)*, 1.

Conductor was not justified in knocking person, whom he had ejected for refusal to pay fare, from car platform. *Lindsay v. Wabash Ry. Co. (Mich.)*, 62.

Declaration did not warrant recovery for negligence of conductor in failing to discover plaintiff's mental derangement. *Lindsay v. Wabash Ry. Co. (Mich.)*, 62.

Declaration in trespass vi et armis justified proof of the commission of an assault by a railway conductor while preventing a person from boarding a train after he had been ejected for his refusal to pay fare; and the proof might show justification. *Lindsay v. Wabash Ry. Co. (Mich.)*, 62.

Rape of passenger by brakeman, absence of complaint did not disprove charge, but the jury were bound to consider all the circumstances. *Garvik v. Burlington, etc., Ry. Co. (Iowa)*, 496.

Rape of passenger by brakeman, evidence held sufficient. *Garvik v. Burlington, etc., Ry. Co. (Iowa)*, 496.

CARRIERS OF PASSENGERS—Continued.

Rape of passenger by brakeman, railroad liable for. *Garvik v. Burlington, etc., Ry. Co. (Iowa)*, 496.

Carrier was not bound to have car vestibuled, but, having done so, it could not with impunity lead passengers to believe that the doors of the vestibule would be kept closed between stations, and then negligently leave them open, without incurring liability to a passenger injured thereby. *Crandall v. Minneapolis, etc., Ry. Co. (Minn.)*, 478.

Conductor without implied authority to waive contract provision requiring shipper of stock to ride in caboose. *Illinois Cent. R. Co. v. Jennings (Ill.)*, 15.

Contributory Negligence.

Alighting from moving street car. *Joyce v. Los Angeles Ry. Co. (Cal.)*, 66.

Alighting from moving train. *Baltimore & O. S. W. R. Co. v. Mullen (Ill.)*, 6.

Alighting passenger injured, fact that it was dark, and he felt no motion of the train and believed it had stopped, and got off at place pointed out to him by depot officials, must be considered by jury. *Baltimore & O. S. W. R. Co. v. Mullen (Ill.)*, 6.

Boarding crowded car when urged by conductor to crowd on, question for jury. *Alton Light & Traction Co. v. Oliver (Ill.)*, 33.

Leaving seat and stepping to side of slowly moving open street car. *Davis v. Camden G. & W. Ry. Co. (N. J.)*, 665.

Passenger descending to lower step of street car and making ready to alight when car should stop. *Wabash River Traction Co. v. Baker (Ind.)*, 493.

Passenger killed in collision with another car while riding on running board. *Abel v. Northampton Traction Co. (Pa.)*, 80.

Passenger passing through cars, by conductor and porter, in search of water, and stepping off unlighted and unguarded back platform of rear car, recovery precluded. *Hunter v. Atlantic Coast Line R. Co. (S. Car.)*, 55.

Passenger standing on step of street car injured by reason of sudden movement of car. *Joyce v. Los Angeles Ry. Co. (Cal.)*, 66.

Question for jury in action for injuries sustained by passenger when alighting from street car. *Indiana Union Traction Co. v. Jacobs (Ind.)*, 653.

Rape of passenger by brakeman, proper to refuse to submit question of contributory negligence, in action against railroad. *Garvik v. Burlington, etc., Ry. Co. (Iowa)*, 496.

Right of street car passenger to assume that car has stopped at safe place. *Indiana Union Traction Co. v. Jacobs (Ind.)*, 653.

Right of street car passenger to assume that car will not be moved without notice to him. *Davis v. Camden G. & W. Ry. Co. (N. J.)*, 665.

Rule prohibiting passengers from riding on front platform of street car, effect of passenger's violation of. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.

Shipper of stock must ride in caboose while train is moving, according to contract requirement. *Illinois Cent. R. Co. v. Jennings (Ill.)*, 15.

Taking position near track on crowded platform. *Cousineau v. Muskegon T. & L. Co. (Mich.)*, 659.

Where passenger knew that on certain street cars there was a notice stating that passengers choosing to ride on the front platform did so at their own risk, it was not necessary for the company, in order to defeat an action by the passenger for injuries received while alighting from the front platform of

CARRIERS OF PASSENGERS—Continued.

a car, to prove that he also had seen such notice on the particular car on which he was riding. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.

Damages.

Evidence that a train was run over a trestle at 50 miles an hour when the schedule time was 33, and that an accident resulted, may support punitive damages in an action for wrongful death of a passenger. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

Excessive verdict for ejection of passenger. *Southern Ry. Co. in Kentucky v. Hawkins (Ky.)*, 21.

Extent of carrier's liability on account of its station agent's misrepresentations to prospective passenger as to the best route to her destination. *St. Louis, etc., R. Co. v. White (Tex.)*, 796.

Instruction in relation to worldly circumstances of the parties to an action for insulting passenger required the granting of a new trial. *Georgia Ry. & Electric Co. v. Baker (Ga.)*, 789.

Loss of time and expense incurred not recoverable, in action for ejection of passenger, in absence of appropriate pleading and proof. *Southern Ry. Co. in Kentucky v. Hawkins (Ky.)*, 21.

Punitive damages, when not recoverable for ejection of passenger. *Southern Ry. Co. in Kentucky v. Hawkins (Ky.)*, 21.

Rape of passenger by brakeman resulting in pregnancy, instruction did not warrant an inference that damage might be awarded for time lost in caring for the child. *Garvick v. Burlington, etc., Ry. Co. (Iowa)*, 496.

Rape of passenger by brakeman, verdict was excessive. *Garvick v. Burlington, etc., Ry. Co. (Iowa)*, 496.

Threat to expel passenger from street car, who presented a transfer which was defective through no fault of his. *Georgia Ry. & Electric Co. v. Baker (Ga.)*, 789.

Degree of Care.

Care required of carrier to protect its passengers from employees, passengers and strangers. *St. Louis, etc., Ry. Co. v. Hatch (Tenn.)*, 782.

Evidence that a railroad furnished its road, ran its trains, and inspected its trestles in the manner which is generally believed to be safe and prudent should go to the jury on the question of due care. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

In action by passenger for injuries sustained by the alleged negligence of a carrier, the Federal Circuit Court of Appeals is governed by the law as declared by the United States Supreme Court with reference to the measure of care required of the carrier. *Southern Pac. Co. v. Cavin (C. C. A.)*, 803.

Instruction requiring higher degree from street railways than steam railroads, and stating that carrier's duty was not discharged until it had set passenger down safely, etc., was not commendable in its opening statement, but was not erroneous. *Wabash River Traction Co. v. Baker (Ind.)*, 493.

Railroad company, though not an insurer of the lives of its passengers, is liable for injuries to a passenger by unsound timber in a trestle or by any other defect therein. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

Duty of carrier to protect passenger from indignities, as against a fellow passenger. *Franklin v. Atlanta, etc., Ry. Co. (S. Car.)*, 563.

Duty to give passenger time to alight. *Baltimore & O. S. W. R. Co. v. Mullen (Ill.)*, 6.

Duty to helpless passenger without attendant. *Illinois Cent. R. Co. v. Allen (Ky.)*, 49.

CARRIERS OF PASSENGERS—Continued.**Ejection.**

In order to justify ejection and arrest of passenger for violation of separate coach law, the carrier must have itself complied with the law. *Waldauer v. Vicksburg Ry. & Light Co.* (Miss.), 504.

Invalid ticket and refusal to pay fare, conductor not guilty of a tort in expelling passenger without using unnecessary force. *Southern Ry. Co. v. Hawkins* (Ky.), 21.

No fatal variance where petition alleged purchase of ticket and wrongful and willful ejection of passenger, and proof showed the ticket had been so punched, through negligence of ticket agent or of a prior conductor, as to render it valueless for use at time plaintiff was ejected. *Southern Ry. Co. v. Hawkins* (Ky.), 21.

Passenger, ejected from car for refusing to pay fare other than by certain transfer ticket, could recover damages for the tort, and should not be restricted to damages for breach of the contract to carry him. *Cleveland City Ry. Co. v. Conner* (Ohio), 649.

Threat by conductor of second car to expel a passenger on account of a mistake in the transfer slips is a legal wrong, giving the passenger a right of action against the company, though there is nothing insulting in the words or manner of the conductor. *Georgia Ry. & Electric Co. v. Baker* (Ga.), 789.

Evidence.

Dangerous speed of train alleged, evidence of condition of cars after collision was admissible. *Elgin, A. & S. Traction Co. v. Wilson* (Ill.), 37.

Declarations of fellow passengers of ejected passenger, that he was a "beat and bum," made as he walked out of car behind conductor, were incompetent. *Southern Ry. Co. in Kentucky v. Hawkins* (Ky.), 21.

Evidence as to effect of collision on the other passengers was immaterial. *Abel v. Northampton Traction Co.* (Pa.), 80.

Exclusion of evidence proving statement made by motorman was immaterial, as there was failure to show violation of any duty owed by the street railway company to the passenger. *McDonough v. Boston Elevated Ry. Co.* (Mass.), 641.

Failure of plaintiff to make a statement before he was put off car, effect of. *Cleveland City Ry. Co. v. Conner* (Ohio), 649.

Injured passenger's uncorroborated testimony was sufficient to sustain verdict in her favor. *Illinois Cent. R. Co. v. Colly* (Ky.), 251.

Of custom to permit passengers of both races to occupy the back platform of defendants' street cars, in action for causing passenger's arrest for violation of separate coach law. *Waldauer v. Vicksburg Ry. & Light Co.* (Miss.), 504.

Proof of certain statement of motorman was admissible in support of passenger's claim that he was thrown off by the negligent jerk of the car. *McDonough v. Boston Elevated Ry. Co.* (Mass.), 641.

Proof of rule to prevent passengers from riding on front platform of street car. *McDonough v. Boston Elevated Ry. Co.* (Mass.), 641.

Witness, in action for death of passenger, in describing the wreck, may state what injuries he received, and that another train ran into the wreck. *Nickles v. Seaboard Air Line Ry.* (S. Car.), 755.

Indignities received by a passenger from outsiders, sufficiency of evidence. *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 782.

In respect to failure to provide a platform in the street, and in

CARRIERS OF PASSENGERS—Continued.

running the car beyond the usual place, the complaint showed no cause of action, but the remaining allegations constituted a showing of negligence, in an action for injury to a street car passenger, caused by alleged failure to provide a suitable place to alight. *Indiana Union Traction Co. v. Jacobs* (Ind.), 653.

Insufficiency of evidence to prove actionable negligence where person, who had told the conductor, in a saloon, that he intended to travel on his train, was injured while attempting to board it after it had started, and claimed that accident was caused by jerk of car. *Southern Ry. Co. v. Johnson* (Ala.), 58.

Invitation to passengers to alight, sufficiency of. *Tilden v. Rhode Island Co.* (R. I.), 809.

Joint liability of carriers where passenger of one of them is injured by reason of collision between their respective cars. *Louisville Ry. Co. v. Blum* (Ky.), 44.

Limiting Liability.

Where evidence showed that husband of plaintiff's intestate agreed to go to a certain point to testify for a railroad company, on condition that it furnished transportation for his wife, if the pass was issued for a consideration, the company is not relieved of liability for negligent killing of the wife by the stipulation on the pass to that effect. *Nickles v. Seaboard Air Line Ry.* (S. Car.), 755.

Main-track switch not locked or guarded, question for jury, whether actionable negligence. *Elgin, A. & S. Traction Co. v. Wilson* (Ill.), 37.

Negligence of street railway, in not making adequate provisions by way of barriers and policemen to guard crowded platform near tracks, at carriers amusement park, was question for jury. *Cousineau v. Muskegon, T. & L. Co.* (Mich.), 659.

Notice to street car conductor of passenger's desire to alight, sufficiency. *Joyce v. Los Angeles Ry. Co.* (Cal.), 66.

Passenger riding in vestibule, jostled by porter and caused to fall off train, carrier liable. *Chicago, etc., Ry. Co. v. Ferguson* (Kan.), 684.

Passenger thrown to floor of car by sudden jar, error in instruction, in failing to require finding of negligence in unnecessary and violent striking of the car as alleged, was cured by another instruction. *Illinois Cent. R. Co. v. Colly* (Ky.), 251.

Passenger thrown to floor of car by sudden jar, instruction authorizing a finding for defendant if the coupling was made in a way that was customary and incidental to railroading, without defining the degree of care with which it should have been done, was too favorable to defendant. *Illinois Cent. R. Co. v. Colly* (Ky.), 251.

Passenger thrown to floor of car by sudden jar, plaintiff's uncorroborated testimony required denial of peremptory instruction for defendant. *Illinois Cent. R. Co. v. Colly* (Ky.), 251.

Presumption of Negligence.

Southern Pac. Co. v. Cavin (C. C. A.), 803.

Collision between trains, evidence of warranted recovery for injuries to passenger, in absence of evidence of contributory negligence. *Elgin, A. & S. Traction Co. v. Wilson* (Ill.), 37.

Derailment causing injury to passenger. *Illinois Cent. R. Co. v. Porter* (Tenn.), 686.

Injury to alighting passenger. *Tilden v. Rhode Island Co.* (R. I.), 809.

Passenger riding on running board from necessity killed by collision with another street car. *Abel v. Northampton Traction Co.* (Pa.), 80.

Prima facie case of negligence where street car passenger was

CARRIERS OF PASSENGERS—Continued.

- injured by reason of sudden movement of car while she was in act of alighting. *Joyce v. Los Angeles Ry. Co. (Cal.)*, 66.
- Right to rebut. *Illinois Cent. R. Co. v. Porter (Tenn.)*, 686.
- Question of carrier's negligence was for the jury, in absence of proof of rules relating to passengers riding on the platforms, in action for injuries sustained by passenger in attempting to alight from street car. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.
- Right to refuse to accept blind man as passenger. *Illinois Cent. R. Co. v. Allen (Ky.)*, 49.
- Separate coach law, what is sufficient compliance with. *Waldauer v. Vicksburg Ry. & Light Co. (Miss.)*, 504.
- Speed of street, duty to regulate where passengers are compelled to ride on car platform. *Alton Light & Traction Co. v. Oliver (Ill.)*, 33.
- Speed of train as negligence. *Illinois Cent. R. Co. v. Porter (Tenn.)*, 686.
- Sufficiency of evidence of negligence where derailment of train caused injury to passenger. *Illinois Cent. R. Co. v. Porter (Tenn.)*, 686.
- Sufficiency of evidence that car was operated by defendant. *Indiana Union Traction Co. v. Jacobs (Ind.)*, 653.
- Sufficiency of petition, under Mo. Rev. St. 1899, § 2864, in action for death of passenger, it not having been essential to allege the particular acts of any particular servant or employee which occasioned the collision. *Anderson v. Missouri Pac. Ry. Co. (Mo.)*, 696.
- Switch, not locked or guarded, thrown by third person, liability of carrier for injury to passenger. *Elgin, A. & S. Traction Co. v. Wilson (Ill.)*, 37.
- Tort of third person causing injury to passenger, carrier not relieved from liability for its failure to use due care to prevent such person from having opportunity to commit act. *Elgin, A. & S. Traction Co. v. Wilson (Ill.)*, 37.
- Vestibule doors, sufficiency of evidence of negligence in leaving them open. *Crandall v. Minneapolis, etc., Ry. Co. (Minn.)*, 478.
- Waiver by conductor of contract provision requiring shipper of stock to ride in caboose, what must be shown to establish, in absence of evidence of express authority on part of conductor. *Illinois Cent. R. Co. v. Jennings (Ill.)*, 15.
- Waiver of provision of contract requiring shipper to ride in caboose, question for jury whether conductor's invitation to ride on engine was. *Illinois Cent. R. Co. v. Jennings (Ill.)*, 15.
- Waiver of rule to prevent passengers from riding on front platform of street car. *McDonough v. Boston Elevated Ry. Co. (Mass.)*, 641.
- When it is not negligence to open side door and floor door of vestibuled coach, and leave them open till station is reached. *Union Pac. R. Co. v. Brown (Kan.)*, 448.
- Where the employees of a railway and a sleeping car company have been negligent in leaving the car for a long period, and in failing to answer bells, they cannot escape liability for indignities to passengers, on the ground that there was no reason for supposing that any such wrong would be committed. *St. Louis, etc., Ry. Co. v. Hatch (Tenn.)*, 782.

Who Are Passengers.

- Court properly confined plaintiff's recovery to section 2864 Mo. Rev. St. 1899, as the deceased brakeman, for whose death the action was brought, was a servant engaged with others in operating and managing the train. *Anderson v. Missouri Pac. Ry. Co. (Mo.)*, 696.
- If a mistake is made by the conductor of the first car issuing a

CARRIERS OF PASSENGERS—Continued.

transfer, and the passenger presents the transfer to the conductor of the second car and gives a reasonable explanation of the mistake of the conductor of the first car, the conductor of the second must at his peril determine whether the passenger is entitled to ride upon the transfer, notwithstanding it does not upon its face show such right. *Georgia Ry. & Electric Co. v. Baker* (Ga.), 789.

Instruction sufficiently required the jury to find that deceased was a passenger at the time of the accident. *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 696.

It was not essential, in order to authorize the submission of the case to the jury, to show by positive or direct evidence that deceased was a passenger at the time of the collision, or that it was his purpose to continue his journey. *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 696.

Mail clerk. *Southern Pac. Co. v. Cavin* (C. C. A.), 803.

One riding on ticket procured at reduced rate by false representation to the effect that she was a student at a certain school was not a passenger. *Fitzmaurice v. New York, N. H. & H. R. R.* (Mass.), 635.

Passenger who has purchased ticket to certain point, but who, on reaching such point, decides to go further, need not, in order to preserve his protection as a passenger, alight from the train and then re-enter, nor expressly notify the conductor of his purpose to continue his journey. *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 696.

Person injured while attempting to board moving train. *Southern Ry. Co. v. Johnson* (Ala.), 58.

Railway postal clerks. *Illinois Cent. R. Co. v. Porter* (Tenn.), 686.

Right to ride on street car to which passenger had been transferred was in no sense a gratuity. *Georgia Ry. & Electric Co. v. Baker* (Ga.), 789.

Shipper of stock required to ride in caboose. *Illinois Cent. R. Co. v. Jennings* (Ill.), 15.

Where deceased, at the time of a collision, was in the coach used by defendant railroad for the purpose of transporting passengers, his residence being at a distant point where his family was, and the train having started to carry such passengers as were on to other points of destination along its line, the presumption was that deceased was lawfully in the coach. *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 696.

CHILDREN.

See NEGLIGENCE.

Burden of proving exercise of proper care by motorman to avoid injuring child seen near track. *Jacksonville Electric Co. v. Adams* (Fla.), 295.

Care required of motorman to prevent injury to child seen near track. *Jacksonville Electric Co. v. Adams* (Fla.), 295.

Care required of person stacking building material in street to prevent stack from being dangerous to children. *Louisville Ry. Co. v. Esselman* (Ky.), 627.

Child injured by reason of its own act in setting fire to powder, while trespassing in a secluded part of defendant's premises, certain instruction as to defendant's duties and rights with respect to storing and keeping powder was proper. *Chambers v. Milner Coal & Ry. Co.* (Ala.), 277.

Child injured by reason of its own act in setting fire to powder, while trespassing in a secluded part of defendant's premises, no recovery on ground of willful, wanton, or reckless conduct. *Chambers v. Milner Coal & Ry. Co.* (Ala.), 277.

CHILDREN—Continued.**Contributory Negligence.**

Act of ten-year-old child, in crossing track in front of street car, could hardly be regarded otherwise than a result of a sudden, unthinking impulse, or of a reckless daring. *Colomb v. Portland & B. St. Ry. (Me.)*, 293.

Care required of child for its own protection. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Care required of child, for its own protection, while playing on building material stacked in street. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Care required of infant for its own safety. *Colomb v. Portland & B. St. Ry. (Me.)*, 293.

Child between 7 and 14 years of age is prima facie incapable of exercising judgment. *Birmingham Ry., L. & P. Co. v. Jones (Ala.)*, 568.

Instruction, in action for death of ten-year-old child, that, if the jury believe he was of sufficient intelligence to know the danger, verdict should be for defendant, was proper, where, had an adult acted as he did, he would have been guilty of contributory negligence. *Chambers v. Milner Coal & Ry. Co. (Ala.)*, 277.

Mere capacity of child under 14 years of age to know danger is not necessarily sufficient to make him guilty of contributory negligence in doing a thing which would be negligence in an adult. *Birmingham Ry., L. & P. Co. v. Jones (Ala.)*, 568.

Negligence of parents, in permitting four-year-old boy to go alone upon streets, was not imputable to him. *Jacksonville Electric Co. v. Adams (Fla.)*, 295.

Overruling of demurrers to pleas of contributory negligence, in an action for death of child, was harmless, plaintiff having got the benefit of the principle claimed as to necessity of pleading and proving requisite intelligence of the child in the charge. *Chambers v. Milner Coal & Ry. Co. (Ala.)*, 277.

Damages.

In action by father as next friend for personal injuries to his child, an instruction authorizing verdict for permanent impairment of the child's earning capacity and for medical attendance is not erroneous, the father being estopped thereby from asserting a claim for loss of services during the infancy of the child and for medical expenses. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Parents of infants are not entitled to recover damages for mental pain and anguish occasioned by the mutilation of the dead body of such infant. *Long v. Chicago, R. I. & P. Ry. Co. (Okla.)*, 589.

Demurrers to pleas setting up contributory negligence, in action by an administratrix for death of child, on the ground that they do not aver that "plaintiff" had sufficient discretion, are properly overruled. *Chambers v. Milner Coal & Ry. Co. (Ala.)*, 277.

Liability for injury to child sustained on attractive and dangerous premises. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Ordinances of city, permitting an owner engaged in constructing a building to appropriate a part of the adjacent street for the storage of materials, does not relieve the owner from the exercise of such ordinary care in placing the material as may be required by a due regard for the safety of children in the habit of playing in the street. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

Verdict for person constructing building, and stacking iron beams in street, in action for injuries to child, was properly set aside as against the evidence. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.

COMMERCIAL RAILROADS.

See STREET RAILWAYS.

COMMON CARRIERS.

See CARRIERS.

Act of God which will excuse a common carrier, definition of. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

A railroad company, acting as a common carrier, is bound to serve all the members of the public alike who apply for service under like conditions. *State v. Atlantic Coast Line R. Co.* (Fla.), 710.

Care required of. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Definition of common carrier. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Limiting Liability.

Agreed valuation, in consideration of reduced rate, validity of contract. *Missouri, etc., Ry. Co. v. Patrick* (C. C. A.), 483.

Negligence of shipper and natural wear and tear, carrier not responsible for. *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 679.

Termination of liability of common carrier. *Bowdon v. Atlantic Coast Line Ry. Co.* (Ala.), 735.

Where a railroad company, acting as a common carrier, voluntarily engages in transporting and delivering between stations on its line of road the poles, wires, etc., of one telegraph company, it may be compelled by mandamus to perform a similar service for another telegraph company, nor is the duty of the common carrier affected by reason of the service being performed under a contract. *State v. Atlantic Coast Line R. Co.* (Fla.), 710.

COMPROMISE.

See DAMAGES.

CONCURRENT NEGLIGENCE.

See FELLOW SERVANTS.

CONDEMNATION PROCEEDINGS.

See EMINENT DOMAIN.

CONNECTING CARRIERS.

See BAGGAGE.

Failure of delivering carrier to have a waybill for the freight furnished no ground for such carrier's refusal to deliver the goods to the owner and consignee after arrival. *Bowdon v. Atlantic Coast Line Ry. Co.* (Ala.), 735.

Goods received for carriage by a railroad from a connecting line are, in the absence of a statement to the contrary in the receipt for the goods, presumed to have been received as "in good order," but this presumption may be rebutted by proof that no receipt was given, and that they were not in good order when received. *Southern Ry. Co. v. Waters & Co.* (Ga.), 480.

Liability of each company for injury to freight. *Southern Ry. Co. v. Waters & Co.* (Ga.), 480.

Limiting Liability.

As the evidence upon which plaintiff relied for a recovery disclosed that under the special contract the liability of each of the connecting carriers was limited to loss or damage occurring on its own line, and also that the delay which caused the loss occurred before the shipment was turned over to the carrier, a nonsuit was properly granted. *Bell Bros. v. Western & A. R. Co.* (Ga.), 751.

CONNECTING CARRIERS—Continued.

Misrepresentations of carriers' station agent to prospective passenger as to the best route to her destination did not render carrier liable for certain delays on connecting railroads. *St. Louis, etc., R. Co. v. White* (Tex.), 796.

Presumption arising from receipt stating that goods were "in good order," and presumption arising from failure to state the condition of the goods, railroad company receiving goods from a connecting line may protect itself by a receipt setting forth exemption as to the condition of the goods. *Southern Ry. Co. v. Waters & Co.* (Ga.), 480.

When carriers must settle among themselves the question of ultimate liability for injury to freight. *Southern Ry. Co. v. Waters & Co.* (Ga.), 480.

Where a railroad company receives from another railroad goods to be transported, and receipts for them as "in good order," such company is concluded by the receipt from setting up, as against the consignee, that the goods were not in good order when received. *Southern Ry. Co. v. Waters & Co.* (Ga.), 480.

CONSTITUTIONAL LAW.

See EMPLOYERS' LIABILITY ACTS; STREET RAILWAYS; TAXATION.

A certain construction of a contract of shipment did not deny defendant carrier equal protection of the laws of the United States, etc., so as to give the Supreme Court jurisdiction of an appeal in an action for damages to freight. *Phoenix Powder Mfg. Co. v. Wabash R. Co.* (Mo.), 487.

Constitutionality of penal statute requiring railroad to provide pure drinking water for passengers. *Southern Ry. Co. v. State* (Ga.), 475.

In so far as the Legislature has undertaken to inflict upon violators of Ga. Pen. Code, 1895, § 522, requiring railroads to furnish pure drinking water for passengers, punishment other than fine, its punitive clause is inoperative, because incapable of enforcement. *Southern Ry. Co. v. State* (Ga.), 475.

Ordinance requiring fenders on street cars was void for nonuniformity and as discriminating in favor of some manufacturers of fenders. *City of Elkhart v. Murray* (Ind.), 94.

CONTRACTORS.

See INDEPENDENT CONTRACTORS.

CONTRACTS.

See DAMAGES.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS OF PASSENGERS; CHILDREN; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS IN STREETS; STOCK, INJURIES TO; STREET RAILWAYS.

Burden of proof. *Hickey v. Rio Grande Western Ry. Co.* (Utah), 318.

Evidence.

Habit of driving with loose rein was inadmissible as not within the issue, on question of contributory negligence of another occupant of vehicle. *Bresee v. Los Angeles Traction Co.* (Cal.), 537.

Habits of driver of vehicle with respect to dangers arising from collisions with cars, admissibility on question of contributory negligence of person he was driving. *Bresee v. Los Angeles Traction Co.* (Cal.), 537.

CONTRIBUTORY NEGLIGENCE—Continued.

In action for personal injuries to plaintiff while riding on a pung near a railroad track, he is not entitled to recover, if either his own negligence or that of the driver of the pung contributed to the happening of the accident. *Kane v. Boston Elevated Ry. Co.* (Mass.), 581.

Influence of fear, instruction was erroneous, as plaintiff's conduct was to be judged by what men of ordinary prudence would have done. *Alabama Great Southern R. Co. v. Fulton* (Ala.), 311.

Want of plea of contributory negligence does not preclude the court from awarding a nonsuit, where plaintiff's evidence so conclusively shows contributory negligence that the court would grant a new trial in case of verdict in favor of plaintiff. *Brown v. Oregon R. & Navigation Co.* (Wash.), 595.

CONVERSION.

See CARRIERS OF LIVE STOCK.

CORPORATIONS.

See MONOPOLIES; RAILROADS.

COUPLING CARS.

See MASTER AND SERVANT.

CRIMINAL LAW.

See BILLS OF LADING; RAILROADS.

CROSSINGS.

See ANIMALS; FEDERAL JURISDICTION.

Collision with team, fact that the car was an extra, running 14 seconds behind a regular, at such a speed that, while it was going the distance between the cars, the team, going at a rapid walk, went 130 feet, does not show negligence. *Hattcher v. McDermot* (Md.), 533.

Contributory Negligence.

Person hearing no train, because of failure to give statutory crossing signals, and seeing none, because of intervening woods, was not guilty of negligence in assuming that no train was near and driving on the track. *Dougherty v. Chicago, M. & St. P. Ry. Co.* (S. Dak.), 288.

Prima facie case from proof of killing by defendant's train, at crossing, of plaintiff's horse; and burden of proof is not shifted to plaintiff by introduction of evidence by defendant, though it, by overcoming his prima facie case, may require him to give further evidence. *Dougherty v. Chicago, M. & St. P. Ry. Co.* (S. Dak.), 288.

Signals.

Act of engineer in running train over public road crossing, in violation of the requirements of the blow-post law, a misfeasance which renders him individually liable to persons injured as a result of such conduct. *Southern Ry. Co. v. Grizzle* (Ga.), 451.

Error to allow member of deceased's gang to testify in action for death of trackman that they relied on railroad's custom to give signals to warn them of approach of trains, when repairing track. *Norfolk & W. Ry. Co. v. Gesswine* (C. C. A.), 553.

Finding that collision with team was caused by failure to give statutory crossing signals, rendering railroad liable, in absence of contributory negligence, was warranted by the evidence. *Dougherty v. Chicago, M. & St. P. Ry. Co.* (S. Dak.), 288.

Positive and negative testimony as to whether signals were

CROSSINGS—Continued.

given, comparative weight of. *Ives v. Wisconsin Cent. Ry. Co. (Wis.)*, 393.

Refusal to admit testimony as to how far signals could be heard was immaterial, where there was conclusive evidence that they were given. *Ives v. Wisconsin Cent. Ry. Co. (Wis.)*, 393.

Statutory signals were not for the protection of trackman. *Norfolk & W. Ry. Co. v. Gesswine (C. C. A.)*, 553.

Testimony of persons in wagon struck by car, that they did not hear the gong sounded is not evidence to go to the jury on the question of negligence, as a whistle might have been sounded. *Hattcher v. McDermot (Md.)*, 533.

Where 14 witnesses testified that signals were given, and 9 testified that they did not hear any signals, the fact that the duty to give signals was performed was conclusively established. *Keiser v. Lehigh Valley R. Co. (Pa.)*, 303.

Speed.

Act of engineer in running train over public road crossing in violation of the requirements of the blowpost law is a misfeasance, which renders him individually liable to persons injured as a result of such conduct. *Southern Ry. Co. v. Grizzle (Ga.)*, 451.

Running passenger train in the nighttime over a country crossing at the rate of 35 miles an hour is not negligence. *Keiser v. Lehigh Valley R. Co. (Pa.)*, 303.

Stop, Look, and Listen.

Contributory negligence of driver of team struck by car, in not stopping again before driving on the track, precluded recovery. *Hattcher v. McDermot (Md.)*, 533.

Duty to look before driving on street railway tracks. *Timler v. Philadelphia Rapid Transit Co. (Pa.)*, 500.

That passenger train is running 25 minutes behind schedule time does not show negligence. *Keiser v. Lehigh Valley R. Co. (Pa.)*, 303.

CUSTOM AND USAGE.

See NEGLIGENCE.

DAMAGES.

See BAGGAGE; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CHILDREN; DEATH BY WRONGFUL ACT; FEDERAL COURTS; PERSONAL INJURIES; RIGHT OF WAY; STREET RAILWAYS; TRESPASSERS; TRIAL.

Evidence.

Evidence that during negotiations for a settlement plaintiff fixed the amount of her damages at \$500, instead of \$2,000, the amount sued for, was inadmissible. *Illinois Cent. R. Co. v. Colly (Ky.)*, 251.

One seeking to recover special damages for breach of a contract must show that such damages were within the contemplation of both parties to the contract. *Illinois Cent. R. Co. v. Johnson & Fleming (Tenn.)*, 727.

Whether there is any evidence in a given case to justify assessment of exemplary damages is question for the court. *Southern Ry. Co. in Kentucky v. Hawkins (Ky.)*, 21.

DEATH BY WRONGFUL ACT.

See CARRIERS OF PASSENGERS; EVIDENCE.

Burden of proving negligence, as affected by existence of presumption of due care on part of deceased. *Powers v. Pere Marquette R. Co. (Mich.)*, 559.

DEATH BY WRONGFUL ACT—continued.

Contributory negligence is no defense to a count charging the intentional killing of a person. *Birmingham Ry., L. & P. Co. v. Jones* (Ala.), 568.

Damages.

Where, in action for death of plaintiff's husband, there was evidence that his earning capacity was small, it was not error to admit evidence that his father had been in the habit of assisting his wife. *Abel v. Northampton Traction Co.* (Pa.), 80.

Evidence.

Where, in an action by an administrator, the records of the probate court granting administration have been admitted, it is not proper to ask the administrator on cross-examination, if he has been sworn in. *Nickles v. Seaboard Air Line Ry.* (S. Car.), 755.

Evidence in action for death of switchman was insufficient to submit case to the jury. *Powers v. Pere Marquette R. Co.* (Mich.), 559.

Fact that wife, suing for death of her husband, had consulted counsel as to matter of divorce, was no defense. *Abel v. Northampton Traction Co.* (Pa.), 80.

Right of action depends solely on the statute of the state where the wrongful act is committed. *Coe v. Wainwright* (Iowa), 530.

Under Ala. Code 1896, § 27, a railroad, when sued for negligent death of engineer from defect in roadbed, cannot set off damages to its cars by reason of decedent's negligence. *Western Ry. v. Russell* (Ala.), 225.

Where court can see testimony from which a probability can arise in favor of plaintiff, suing for death negligently inflicted, the cause should be submitted to the jury. *Powers v. Pere Marquette R. Co.* (Mich.), 559.

Where resident of Iowa suffered wrongful death in Illinois, leaving a widow but no issue, and his Iowa administrator settled the railroad's liability, such sum was distributable to decedents' widow in Iowa, under the Illinois law. *Coe v. Wainwright* (Iowa), 530.

DEDICATION.

See RAILROADS.

DEGREE OF CARE.

See CARRIERS.

DE MINIMIS NON CURAT LEX.

See PERSONAL INJURIES.

DISCRIMINATION.

See COMMON CARRIERS.

DOGS.

See ANIMALS.

DRINKING WATER.

See CONSTITUTIONAL LAW.

ELECTRIC COMPANIES.

See NEGLIGENCE.

EMINENT DOMAIN.

See RIGHT OF WAY; STREET RAILWAYS.

Damages.

Market value of other property is not the criterion for ascertain-

EMINENT DOMAIN—Continued.

- ing the proper compensation where the land sought to be condemned is a portion of a freight terminal of a railroad system. *Sanitary Dist. v. Pittsburgh, etc., Ry. Co. (Ill.)*, 145.
- Returns of the property for taxation, made by lessee of owner, were not conclusive on question of value. *Sanitary Dist. v. Pittsburgh, etc., Ry. Co. (Ill.)*, 145.
- Where land sought to be condemned was used as a freight terminal, evidence of extent of the business transacted at the terminal station, as well as the capacity of the property for extension to meet increasing demands of the business, is properly admitted. *Sanitary Dist. v. Pittsburgh, etc., Ry. Co. (Ill.)*, 145.
- Where there is no stipulation as to when possession of the land shall be taken, it is not error to instruct jury that, if the time taken to remove a portion of the land which it was proposed to remove would affect the amount of damages to the remainder, they should estimate the same on the basis of what should be the ordinary and natural consequences to the strip, and the damages resulting therefrom. *Sanitary Dist. v. Pittsburgh, etc., Ry. Co. (Ill.)*, 145.

Evidence.

- Qualification of witnesses to testify as experts as to the value of the property, in proceeding to condemn land occupied as a railway freight terminal. *Sanitary Dist. v. Pittsburgh, etc., Ry. Co. (Ill.)*, 145.
- Petitioner must ascertain title to the land before commencing condemnation proceedings, and name owner in petition; and, if the title is less than fee simple, it should be so stated. *Sanitary Dist. v. Pittsburgh, etc., Ry. Co. (Ill.)*, 145.
- Record in condemnation proceeding must show some issue on the question to justify decision as to title to the land. *Sanitary Dist. v. Pittsburgh, etc., Ry. Co. (Ill.)*, 145.
- Where defendant's residence was situated on the corner of two streets, he was not entitled to compensation from the condemning road because the other road was compelled to stop its trains in front of defendant's residence, and to give signals as required by the statutes in relation to the intersection of railroads. *Bracey v. St. Louis, etc., R. Co. (Ark.)*, 827.

EMPLOYERS' LIABILITY ACTS.

See LOGGING RAILROADS.

- Constitutionality of Ohio fellow servant act, which adopts the superior servant limitation of the fellow servant rule, and classifies certain employees. *Kane v. Erie R. Co. (C. C. A.)*, 233.
- Iowa Code, § 2071, providing that railroads shall be liable for damages sustained by employees or others in consequence of the neglect of employees of the railroad, and that no contract which restricts such liability shall be legal or binding, is within the legislative power to enact, and is not an unconstitutional interference with the liberty of contract. *Mumford v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 431.

Limiting Liability.

- Provision in contract between railroad and brakeman, that, in consideration of employment, the brakeman agrees to give the railroad notice of personal injuries sustained by him within thirty days after receiving them, and that his failure to give such notice shall be a bar to an action therefor, is in violation of Iowa Code, § 2071. *Mumford v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 431.
- Railroad cannot evade liability under the Ohio statute, by which the superior servant limitation of the fellow servant rule is made

EMPLOYERS' LIABILITY ACTS—Continued.

a law, by putting a dummy in nominal charge of every other employee on a train. *Kane v. Erie R. Co. (C. C. A.)*, 233.

Under North Carolina fellow servant act, railroad is liable for injuries to an employee, resulting from the negligence of his helpers engaged in shoveling coal from a car into a tender. *Fitzgerald v. Southern Ry. Co. (N. Car.)*, 368.

Under the Ohio fellow servant act, which divides all the employees of a railroad company, with respect to those working in separate departments constructively, into superiors and subordinates, etc., a railroad is liable for injury or death of a fireman through the negligence of an engineer of another train having authority over his own fireman, although he himself is subject to the control of the conductor of his train. *Kane v. Erie R. Co. (C. C. A.)*, 383.

EVIDENCE.

See **BILLS OF LADING; CARRIERS OF PASSENGERS; DAMAGES; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; FRIGHTENING TEAMS; LOGGING RAILROADS; MASTER AND SERVANT; NEGLIGENCE; PERSONAL INJURIES; RIGHT OF WAY; STOCK, INJURIES TO; STREET RAILWAYS; TICKETS AND FARES; WATER AND WATERCOURSES.**

Experimental evidence, in action for running train against team. *Chicago & E. I. R. Co. v. Crose (Ill.)*, 512.

In action for death of passenger, evidence of a witness that he was an employee, and the railroad company had settled with him, though improper, was harmless error, where the railroad only paid him his wages while disabled. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

In action for death of plaintiff's wife in a railroad accident, where both sides admit that deceased had been granted a pass over defendant's road, evidence by deceased's husband that he would not have come to work for defendant unless his wife had been furnished transportation was not improperly admitted as a matter of opinion. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

In trespass against railroad for damages to plaintiff's land, owing to destruction of plaintiff's fences, etc., by defendant's contractor, it was error to admit evidence of liability under a contract, in which the company agreed, at the time plaintiff conveyed a right of way, to replace fences in time to protect the crops. *St. Louis, etc., Ry. Co. v. Gillihan (Ark.)*, 624.

Newspapers as evidence of certain cloud-burst, certain proof did not authorize their introduction. *Southern Pac. Co. v. Cavin (C. C. A.)*, 803.

Not proper to permit medical expert to give an opinion based on testimony as he has construed it from having heard it. *Elgin, A. & S. Traction Co. v. Wilson (Ill.)*, 37.

Opinion evidence as to how far railroad track could be seen from certain point. *Chicago & E. I. R. Co. v. Crose (Ill.)*, 512.

Photographs of scene of accident. *Chicago & E. I. R. Co. v. Crose (Ill.)*, 512.

Res Gestæ.

Contemporaneousness of events. *Norfolk & W. Ry. Co. v. Gesswine (C. C. A.)*, 553.

Speed of train, evidence of rendered immaterial by conductor's testimony. *Keiser v. Lehigh Valley R. Co. (Pa.)*, 303.

Where a train is wrecked on a trestle, an expert may describe the condition of the wreck, but cannot give his opinion as to its cause. *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 755.

EXEMPLARY DAMAGES.

See **DAMAGES.**

EXPERT TESTIMONY.

See EVIDENCE; MASTER AND SERVANT.

EXPLOSIVES.

See CHILDREN.

FEDERAL COURTS.

Excessiveness of damages for personal injuries is reviewable in federal courts only on motion for new trial in the trial court, and not on writ of error. *Southern Pac. Co. v. Cavin* (C. C. A.), 803. In action by passenger against carrier, the Federal Circuit Court of Appeals is governed by the law as declared by the United States Supreme Court with reference to the measure of care required of the carrier. *Southern Pac. Co. v. Cavin* (C. C. A.), 803.

FEDERAL JURISDICTION.

See CARRIERS OF PASSENGERS.

It was proper for the court to grant the railroad's renewed motion for removal of the cause to the federal court, on the ground that the citizen defendant, one of its employees, had been joined for the sole purpose of preventing such removal. *Dudley v. Illinois Cent. R. Co.* (Ky.), 844.

Petition stated a cause of action against all the defendants, which precluded a removal of the cause to the federal court by the nonresident defendants, on a petition alleging that the nonresident corporation was joined for the fraudulent purpose of preventing a removal. *White's Adm'r v. Chicago, etc., R. Co.* (Ky.), 849.

Where, in an action for death, a joint cause of action is stated against several defendants, one of whom is a resident of the same state as plaintiff, the other defendants, on proving at the trial that the resident defendant was joined for the fraudulent purpose of preventing a removal of the cause to the federal court, may then avail themselves of the misjoinder, and remove the cause. *White's Adm'r v. Chicago, etc., R. Co.* (Ky.), 849.

Where petition sought recovery solely upon the ground that defendant engineer had failed to comply with the blowpost law, and its averments in reference to the location of warehouses near the crossing were made merely as a matter of inducement, there was not a separable controversy between the railroad company, joined with the engineer as defendant, and the plaintiff, and as the engineer was a resident of the state of Georgia, the refusal of the judge to remove the case to the federal court was not erroneous. *Southern Ry. Co. v. Grizzle* (Ga.), 451.

Where the petition stated a joint cause of action for negligent injuries to a resident brakeman against his master, a nonresident railroad, and its resident agent, the court properly denied the motion of the railroad company in the first instance to transfer the cause to the federal court. *Dudley v. Illinois Cent. R. Co.* (Ky.), 844.

FELLOW SERVANTS.

See EMPLOYERS' LIABILITY ACTS.

Combined negligence of master and fellow servant causing injury to servant, master liable. *Root v. Kansas City Southern Ry. Co.* (Mo.), 171.

Combined negligence of master and fellow servant, liability of master for injury to servant. *Moore v. St. Louis Transit Co.* (Mo.), 444.

In action for injury to fireman from explosion of boiler, instruction on right to recover was not objectionable on account of the phrase "or its (the defendant's) engineer in charge of the engine knew, or by the exercise of ordinary care could have known,"

FELLOW SERVANTS—Continued.

- etc., on the theory that it made defendant liable for the negligent act of the engineer; he, as to the inspection of the boiler, being a vice principal. *Illinois Cent. R. Co. v. Quirey* (Ky.), 162.
- In action for injury to street railway employee, certain evidence was sufficient to authorize instruction that, where a master confers authority on an employee to take charge of a class of work, the employee, in directing the men, is not a fellow servant, and his directions are commands of the master. *North Chicago, St. R. Co. v. Aufmann* (Ill), 421.
- Liability of master for negligence of fellow servant, general rule. *Louisville & N. R. Co. v. Wyatt's Adm'r* (Ky.), 413.
- Liability of servant for injuries to his fellow servant. *Dudley v. Illinois Cent. R. Co.* (Ky.), 844.
- Prior to the passage of 87 Ohio Laws, p. 150, § 3, a railroad was not responsible to an employee for injuries from negligence of his fellow servant, except where one employee was put under the control of another. *Kane v. Erie R. Co.* (C. C. A.), 233.
- Telegraph operator fellow servant of trainmen. *Northern Pac. Ry. Co. v. Dixon* (C. C. A.), 242.
- Where a grating was removed from the floor, without the master's authority, by a fellow servant of one who fell through the opening, this did not constitute negligence on the part of the master. *Horrigan v. Boston Elevated Ry. Co.* (Mass.), 443.

FENCES.

See STOCK, INJURIES TO.

FIRES SET BY LOCOMOTIVES.

See MASTER AND SERVANT; RIGHT OF WAY.

Certain instruction that, the absence of negligence on part of the railroad prevented recovery, was properly refused as an expression of opinion on the facts, forbidden by North Carolina Revisal 1905, § 535. *Williams v. Atlantic Coast Line R. Co.* (N. Car.), 522.

Combustibles on right of way may render railroad liable. *Williams v. Atlantic Coast Line R. Co.* (N. Car.), 522.

Contributory Negligence.

It was proper to instruct that the jury might find plaintiff precluded from recovery by contributory negligence, in leaving the door of his barn open, though there was no plea thereof. *Brown v. Oregon R. & Navigation Co.* (Wash.), 595.

Leaving combustible material on a railroad right of way is not necessarily negligence on the part of the company, though the extent of such material and its proximity to the track may justify a jury in finding negligence. *Root v. Kansas City Southern Ry. Co.* (Mo.), 171.

Liability of railroad, general rules. *Williams v. Atlantic Coast Line R. Co.* (N. Car.), 522.

Origin of fire was question for jury. *Williams v. Atlantic Coast Line R. Co.* (N. Car.), 522.

Railroad may grant privilege, by contract, of building elevator upon its right of way, on condition that it shall not be responsible for damages caused by fires resulting from the operation of its engines. *James Quirk Milling Co. v. Minneapolis, etc., Ry. Co.* (Minn.), 584.

Railroad's liability depends upon existence of negligence. *Williams v. Atlantic Coast Line R. Co.* (N. Car.), 522.

Where fire escapes from an engine in proper condition and properly operated, and the fire catches off the right of way, the railroad is not liable. *Williams v. Atlantic Coast Line R. Co.* (N. Car.), 522.

Where fire escapes from defective engine, or from a good engine

FIRES SET BY LOCOMOTIVES—Continued.

not properly operated, and fire catches off the right of way, the railroad is liable. *Williams v. Atlantic Coast Line R. Co. (N. Car.)*, 522.

FORECLOSURE.

See RAILROADS; TAXATION.

FOREIGN CORPORATIONS.

See RAILROADS.

FORFEITURE.

See STREET RAILWAYS.

FREE PASS.

See TICKETS AND FARES.

FRIGHTENING TEAMS.

See LICENSEES.

Care required of trainmen after becoming aware that team is frightened. *Alabama Great Southern R. Co. v. Fulton (Ala.)*, 311.

Care required of trainmen after discovering that mule driven near track was frightened. *Alabama Great Southern R. Co. v. Fulton (Ala.)*, 311.

Contributory Negligence.

Attempting to get out of vehicle after team is frightened, instruction was erroneous, as plaintiff's conduct was to be judged by what men of ordinary prudence would have done. *Alabama Great Southern R. Co. v. Fulton (Ala.)*, 311.

Certain instruction was properly refused as superfluous and as improperly singling out isolated facts and confining jury's attention to them. *Hickey v. Rio Grande Western Ry. Co. (Utah)*, 318.

Of teamster, whose team was frightened by sudden escape of steam from locomotive, was question for jury. *Hickey v. Rio Grande Western Ry. Co. (Utah)*, 318.

Where the owner of a horse and vehicle left them unfastened on a street beside a street railway when he knew a car was about due, and remained in a house where he did not see them for about 10 minutes, he was guilty of contributory negligence barring a right to recover for injuries to them. *Stacey v. Haverhill, G. & D. St. Ry. Co. (Mass.)*, 598.

Evidence.

In action for injury to teamster, whose horse was frightened by sudden escape of steam, testimony as to failure to give warning when engine was started was competent on the issues of negligence and contributory negligence. *Hickey v. Rio Grande Western Ry. Co. (Utah)*, 318.

Evidence was sufficient to show that the steam, by the sudden escape of which a team was frightened, escaped from the cylinder cocks, which were under the control of the locomotive engineer, and not from some appliances not subject to his control. *Hickey v. Rio Grande Western Ry. Co. (Utah)*, 318.

General rules as to liability of railroad. *Foster v. East Jordan Lumber Co. (Mich.)*, 282.

In action for injury to teamster in railroad freight yard, resulting from fright of horse from sudden escape of steam from locomotive, an instruction that, if the evidence showed the escape of steam might have been either from an appliance over which the railroad employees had control, or from an automatic appliance outside of their control, and affirmatively that the escape of steam was not from such appliance, there could be no recovery,

FRIGHTENING TEAMS—Continued.

was properly refused, in view of instructions given on the subject of the burden of proving negligence, etc. *Hickey v. Rio Grande Western Ry. Co. (Utah)*, 318.

Negligence in trainmen to cause engine to make unusual noise after seeing team near track. *Alabama Great Southern R. Co. v. Fulton (Ala.)*, 311.

Negligence of engineer was question for jury, where team in freight yard was frightened by sudden escape of steam from locomotive. *Hickey v. Rio Grande Western Ry. Co. (Utah)*, 318.

Ordinary operations of trains, liability of railroad. *Foster v. East Jordan Lumber Co. (Mich.)*, 282.

Question for jury whether railroad, unnecessarily placing its locomotive near street and then allowing steam to escape, causing horse to run away, was negligent in failing to learn of approach of traveler. *Foster v. East Jordan Lumber Co. (Mich.)*, 282.

Question for jury whether railroad was guilty of actionable negligence in placing its locomotive near street and allowing steam to escape. *Foster v. East Jordan Lumber Co. (Mich.)*, 282.

HUSBAND AND WIFE.

See PERSONAL INJURIES.

IMPUTED NEGLIGENCE.

See CHILDREN; CONTRIBUTORY NEGLIGENCE; NEGLIGENCE.

INDEPENDENT CONTRACTORS.

Independent contractor, in constructing railroad, was not exercising a special power derived from the charter of the railroad, so as to render it liable for his negligence. *Boyd v. Chicago & N. W. Ry. Co. (Ill.)*, 154.

Liability of railroad to landowner for conduct of its independent contraction in constructing road on its right of way. *St. Louis, etc., Ry. Co. v. Gillihan (Ark.)*, 624.

Railroad not liable for negligence of independent contractor, not exercising any special power derived from charter of the railroad. *Boyd v. Chicago & N. W. Ry. Co. (Ill.)*, 154.

Railroad was not liable for injury to day laborer, hired by one to whom contractor had sublet portion of grading of railroad right of way, caused by falling of overhanging bank of earth which the laborer was shovelling into car. *Boyd v. Chicago & N. W. Ry. Co. (Ill.)*, 154.

Railroad was not liable to landowner for conduct of contractor, who, in constructing railroad, made roads through the land, destroyed rails, and threw down and destroyed fences. *St. Louis, etc., Ry. Co. v. Gillihan (Ark.)*, 624.

INJUNCTIONS.

See STREET RAILWAYS.

INJURIES TO PROPERTY.

See STREET RAILWAYS; WATER AND WATER-COURSES.

INSTRUCTIONS.

See CARRIERS OF PASSENGERS; FRIGHTENING TEAMS; LEASES AND RUNNING POWERS; MASTER AND SERVANT; NEGLIGENCE; PERSONAL INJURIES; TRIAL.

INTERSTATE COMMERCE.

Order of a railroad commission requiring railroad company to stop two of its fast mail trains at certain stations is not a burden on interstate commerce. *Railroad Com'rs v. Atlantic Coast Line R. Co. (S. Car.)*, 745.

JOINDER OF MASTER AND SERVANT.

See FEDERAL JURISDICTION.

JOINT LIABILITY.

See MASTER AND SERVANT.

JUDICIAL POWERS.

See STREET RAILWAYS.

JURISDICTION.

See FEDERAL JURISDICTION.

JURORS.

Bias, prejudice of juror against damage suits. *Fitts v. Southern Pac. Co.* (Cal.), 857.

LAST CLEAR CHANCE DOCTRINE.

See ACCIDENTS ON TRACK.

LEASES AND RUNNING POWERS.

In action for injuries from obstruction of culvert, an instruction that, if the lessor railroad had created it, the lessee was not responsible, unless it maintained it after demand to abate it, and if the lessee held it as the person who originally constructed it, without any request to remove it, without any increase in the flow of water, it was not responsible, is not erroneous as a charge on the facts. *Shores v. Southern Ry. Co.* (S. Car.), 88.

Lumber company, granted privilege of running logging train over railroad, was not liable, as a master, for injuries to its conductor resulting from defective track. *Hamilton v. Louisiana & N. W. R. Co.* (La.), 506.

Railroad granting to lumber company privilege of running lumber train was liable when its conductor was injured in a derailment caused by defective bridge. *Hamilton v. Louisiana & N. W. R. Co.* (La.), 506.

Railroad is liable for indignities received by a passenger from a fellow passenger on the cars of such road operated by a lessee. *Franklin v. Atlanta, etc., Ry. Co.* (S. Car.), 563.

Railroad not liable for injuries caused by a change in its embankment made by its lessee in removing an obstruction in culvert. *Shores v. Southern Ry. Co.* (S. Car.), 88.

Where lessee of railroad built an addition to stone culvert erected by its predecessor, which gave way, damming up a creek, thereby destroying plaintiff's crops, the lessee was liable. *Shores v. Southern Ry. Co.* (S. Car.), 88.

LICENSEES.

See NEGLIGENCE.

Assumption of risk by licensee of danger of coming in contact with wires or other stationary appliances in railroad yard. *Atchison, etc., Ry. Co. v. Fuller* (Kan.), 620.

Care due from railroad to pedestrian using path across its yards. *Atchison, etc., Ry. Co. v. Fuller* (Kan.), 620.

Care due from railroad to teamsters rightfully in its yards. *Hickey v. Rio Grande Western Ry. Co.* (Utah), 318.

Contributory Negligence.

Of employee of owner of side track, in backing engine upon railroad track, when he knew a passenger train was due, precluded recovery for his death. *Risque's Adm'r v. Chesapeake & O. Ry. Co.* (Va.), 306.

Walking on track without necessity. *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 573.

Where railroad furnished defective cars to employer of deceased

LICENSEES—Continued.

for use upon such employer's side track, it was the latter's duty to inspect them, and the railroad was not liable for the employee's death caused by defects in the cars. *Risque's Adm'r v. Chesapeake & O. Ry. Co. (Va.)*, 306.

LIENS.

See CARRIERS OF LIVE STOCK.

LIMITATION OF ACTIONS.

In action for injuries to street railway employee, additional counts of pleading, based on the same grounds of negligence, and filed after the expiration of the statutory period, were not barred by limitations, though the original pleading stated the cause of action defectively. *North Chicago St. R. Co. v. Aufmann (Ill.)*, 421.

LIMITING LIABILITY.

See CARRIERS; EMPLOYERS' LIABILITY ACTS; FIRES SET BY LOCOMOTIVES.

LIVE WIRES.

See NEGLIGENCE.

LOGGING RAILROADS.

See LEASES AND RUNNING POWERS.

Complaint, in action for injuries to a brakeman on a logging train, stated a cause of action against his master, the railroad. *Wiest v. Coal Creek R. Co. (Wash.)*, 398.

Evidence.

In action for injuries to brakeman on logging train, evidence as to whether there was anything about the brakes of the train which would render them unsafe by reason of their position on the cars, and as to whether any of the brakes were broken was not objectionable under the complaint. *Wiest v. Coal Creek R. Co. (Wash.)*, 398.

In action against master for injuries to brakeman on logging train, an instruction authorizing verdict for plaintiff, on the jury finding that the failure of defendant to exercise ordinary care to keep the brakes in repair caused the injury, though other causes might also have contributed to it, was not prejudicial to defendant. *Wiest v. Coal Creek R. Co. (Wash.)*, 398.

North Carolina statute depriving railroads of defense of assumption of risk as to any defect in the machinery, ways, or appliances of the master, applies to logging railroads. *Hemphill v. Buck Creek Lumber Co. (N. Car.)*, 411.

MANDAMUS.

See CARRIERS OF GOODS.

MASTER AND SERVANT.

See CROSSINGS; DEATH BY WRONGFUL ACT; EVIDENCE; FELLOW SERVANTS; INDEPENDENT CONTRACTORS; LEASES AND RUNNING POWERS; LIMITATIONS OF ACTIONS; LOGGING RAILROADS; NEGLIGENCE; RAILROADS IN STREETS.

Acts of employees on unlighted hand car after their hours of work had ceased were not within the scope of their employment, nor in the business of the railroad, and the latter, therefore, was not liable for injuries to employees on another hand car. *St. Louis Southwestern Ry. Co. v. Harvey (C. C. A.)*, 379.

Acts of servant must be within scope of his employment and in

MASTER AND SERVANT—Continued.

the business of his master in order to charge latter. *St. Louis Southwestern Ry. Co. v. Harvey* (C. C. A.), 379.
 Appliances, care required of master in furnishing for use of servants. *Drake v. San Antonio & A. P. Ry. Co.* (Tex.), 157.

Assumption of Risk.

Before an engineer operating a train assumes the risk of injury from defect in roadbed occasioned by heavy rainfall, it must appear either that he was warned of the danger or that it was open. *Western Ry. v. Russell* (Ala.), 225.
 Brakeman injured by reason of defect in track, general rules. *Mumford v. Chicago, R. I. & P. Ry. Co.* (Iowa), 431.
 Brakeman, who had passed over certain trestle but six times, usually in the night, did not assume risk from accumulation of combustible material igniting and setting fire to the trestle. *Root v. Kansas City Southern Ry. Co.* (Mo.), 171.
 Complaint by conductor to yardmaster of the unfitness of certain brakemen was notice to the railroad; and the yardmaster's promise of better men for the next trip, which was relied on by the conductor, placed on the railroad all risks for injuries to the conductor caused by the unfitness of the brakemen. *Louisville & N. R. Co. v. Wyatt's Adm'r* (Ky.), 413.
 Conductor relying on promise of better brakemen for next trip. *Louisville & N. R. Co. v. Wyatt's Adm'r* (Ky.), 413.
 Dangerous way of performing duty selected by injured servant, when safe way was within his choice and known to him. *Suttle v. Choctaw, O. & G. R. Co.* (C. C. A.), 377.
 Defective tool, question for jury whether defect sufficiently obvious. *Drake v. San Antonio & A. P. Ry. Co.* (Tex.), 157.
 Doctrine based on servant's knowledge, actual or implied, of the defect which caused the injury, and consent or its equivalent; and, in the absence of such knowledge on the part of the servant, there can be assumption of risk. *Mumford v. Chicago, R. I. & P. Ry. Co.* (Iowa), 431.
 Existence of defects in certain places in a railroad track is not of itself sufficient to charge a brakeman with notice of a particular defect in another place. *Mumford v. Chicago, R. I. & P. Ry. Co.* (Iowa), 431.
 In action for death of engineer from defective roadbed, plea did not show that he assumed risk from defective culvert, rendered dangerous by rain, because it failed to allege what "condition" of the roadbed decedent knew, or that he knew of any condition rendering the track dangerous. *Western Ry. v. Russell* (Ala.), 225.
 In an action for death of engineer from a washout, plea did not show that he assumed the risk, as it did not allege facts showing that the danger was obvious or that he knew of the defect. *Western Ry. v. Russell* (Ala.), 225.
 Negligence in furnishing defective tool for use of servant. *Drake v. San Antonio & A. P. Ry. Co.* (Tex.), 157.
 Slipping of defective rail hook used by injured servant in unloading car, question for jury. *Drake v. San Antonio & A. P. Ry. Co.* (Tex.), 157.
 Street railway employee ordered to move cars in car barns without proper assistance, on promise that he would be furnished assistance, did not assume risk of injury, unless the danger was so imminent that no man of ordinary prudence would have engaged in the work. *North Chicago St. R. Co. v. Aufmann* (Ill.), 421.
 Switchman did not assume risk of master's negligence in furnishing safe place to work and suitable appliances. *Hemphill v. Buck Creek Lumber Co.* (N. Car.), 411.
 That section foreman went on a railroad velocipede by direct

MASTER AND SERVANT—Continued.

order of his superior, did not relieve him from the risk of injuries from trains, where his knowledge of the danger was equal to that of his superior. *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 393.

That train by which sectionman was struck was running at an unusual rate of speed when the accident occurred, does not relieve him of the assumption of risk of injury from the train. *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 393.

That train was running within city limits at unlawful speed did not relieve section man on railroad from a rule that section men assume the risk of trains of all sorts running over the track at all times and at such speed as are attainable, without notice or warning except such as result from the noises of the train including customary signals. *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 393.

Voluntary exposure to danger. *Baker's Adm'r v. Lexington & E. Ry. Co.* (Ky.), 223.

Burden of proving master's negligence in action for injury to servant. *Klunk v. Hocking Valley Ry. Co.* (Ohio), 438.

Burden of proving negligence in cases arising between master and servant. *Northern Pac. Ry. Co. v. Dixon* (C. C. A.), 242.

Burden of proving negligence, or its absence, under section 3365-21. Ohio Rev. St. 1906, in action for injury to employee from defective appliance. *Klunk v. Hocking Valley Ry. Co.* (Ohio), 438.

Care required of master in furnishing safe place to work and suitable appliances. *Chicago, etc., Ry. Co. v. Riley* (C. C. A.), 403.

Contributory Negligence.

Averment that an engineer so negligently operated his engine as to run into a washout, which could have been avoided by the use of ordinary care, is a conclusion of the pleader, and does not show contributory negligence on his part, precluding recovery for his death. *Western Ry. v. Russell* (Ala.), 225.

Brakeman jumping from engine when he saw that it could not be stopped before it reached burning portion of low trestle. *Root v. Kansas City Southern Ry. Co.* (Mo.), 171.

Care required of engineer, who had been cautioned to lookout for high water, to examine track. *Western Ry. v. Russell* (Ala.), 225.

Deceased engineer was not guilty of contributory negligence because he failed to exercise greater care in looking out for washouts at place of the accident than at other like places. *Western Ry. v. Russell* (Ala.), 225.

Employee's right to rely on performance of master's duty to furnish safe place in which, and safe appliance with which, to work. *Wiest v. Coal Creek R. Co.* (Wash.), 398.

In an action for death of engineer from defective roadbed, plea did not show contributory negligence on his part, because it failed to allege that he failed to lookout for highwater, or that, if he had done so, he could have seen the danger; and the averment that he had full knowledge of the location was not an allegation that he knew that the culvert in question was defective. *Western Ry. v. Russell* (Ala.), 225.

In action for death of engineer from defective roadbed, plea which alleged that he was notified that there had been heavy rains along the line, etc., but failed to allege that he was informed of the dangerous conditions existing at place of accident, or that, had he kept a lookout, he could have discovered the danger in time, failed to allege contributory negligence. *Western Ry. v. Russell* (Ala.), 225.

In an action for injury to street car conductor from derailment of his car, caused by an alleged defect in track, the fact that

MASTER AND SERVANT—Continued.

- car was at the time running at excessive speed and might not have left track had it been running slower did not show the conductor to be guilty of contributory negligence, since, though he had general control of the car, it was not within the scope of his duty to regulate the speed at all times. *Moore v. St. Louis Transit Co. (Mo.)*, 444.
- In action for injury to street car conductor from derailment of his car, caused by an alleged defective rail, an instruction implying that plaintiff could not recover if he was in control of the car if it was being run at a greater speed than was allowed by ordinance was erroneous, because ignoring the question presented by the evidence of the company's orders as to running cars according to schedule time. *Moore v. St. Louis Transit Co. (Mo.)*, 444.
- Instruction that, jury should consider whether injured brakeman should have been in the position which he was in when hurt, was, in the absence of a request for a more specific instruction, sufficient as to the effect of a rule of the railroad prohibiting the backing of trains over public crossings without a man on the leading car. *Mumford v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 431.
- In view of a general custom, which in effect abrogated a rule requiring fireman to clean engines "at the end of each trip," the deceased fireman could not be said as matter of law to have been guilty of contributory negligence in being in the position where he was at the time of the collision, but the question was for jury. *Kane v. Erie R. Co. (C. C. A.)*, 383.
- Mental capacity of injured servant to understand the danger and his reliance upon superior ability of his foreman may be considered on issues of assumed risk and contributory negligence. *Drake v. San Antonio & A. P. Ry. Co. (Tex.)*, 157.
- Reliance by servant on care of master. *Dunphy v. Boston Elevated Ry. Co. (Mass.)*, 862.
- Right of trainmen to assume that track is in safe condition. *Western Ry. v. Russell (Ala.)*, 225.
- Slipping of defective rail hook injured servant was using in unloading car, question for jury. *Drake v. San Antonio & A. P. Ry. Co. (Tex.)*, 157.
- Where a master's orders require a servant to violate an ordinance, the master cannot, in action by servant for injuries, claim that the violation of the ordinance constituted contributory negligence. *Moore v. St. Louis Transit Co. (Mo.)*, 444.
- Where brakeman, in making coupling, is required to act promptly in an emergency, that he might have adopted a safer course than the one he followed does not make the question of his negligence one for the court, where there is evidence that he believed he had time to act as he attempted to do. *Chicago & A. Ry. Co. v. Walters (Ill.)*, 166.
- Where, in an action by brakeman for injuries sustained in making coupling, he testified that he knew of the defect in the coupling before the injury occurred, an instruction as to the law applicable, if the defect was not discoverable by plaintiff, was harmless error. *Chicago & A. Ry. Co. v. Walters (Ill.)*, 166.
- Defective rail hook for use in unloading car, negligence of master in furnishing for servant's use was question for jury. *Drake v. San Antonio & A. P. Ry. Co. (Tex.)*, 157.
- Degree of care required in operating trains to avoid injuring brakeman at work on track. *Norfolk & W. Ry. Co. v. Gesswine (C. C. A.)*, 553.
- Degree of care required of master. *Norfolk & W. Ry. Co. v. Gesswine (C. C. A.)*, 553.

MASTER AND SERVANT—Continued.

Duty to warn trainmen of dangerous condition of track. *Western Ry. v. Russell* (Ala.), 225.

Evidence.

Admission of evidence that several months before the accident to brakeman, which resulted from the burning of a trestle, quantities of driftwood had lodged against the trestle was erroneous, in absence of evidence that the driftwood was there at the time of the accident. *Root v. Kansas City Southern Ry. Co.* (Mo.), 171.

Admissions of liability made by a servant, who is not a general agent, or while not engaged in the performance of a duty are inadmissible to bind the master. *McDonough v. Boston Elevated Ry. Co.* (Mass.), 641.

Expert testimony as to usual and proper way of loading logs, qualifications of witnesses. *Louisville & N. R. Co. v. Morton* (Ky.), 249.

Where the petition alleged that defendant negligently allowed driftwood, which was carried down stream under the trestle at high water periods, to remain lodged about the trestle, rendering it liable to take fire, evidence that at the time the right of way was originally cut through the timber logs were left lying on the right of way was outside the issues. *Root v. Kansas City Southern Ry. Co.* (Mo.), 171.

In action for death of brakeman by collision with train, as he was repairing track, an instruction that, if he was hurt while the train was being operated in the usual way, there could be no recovery, was proper. *Norfolk & W. Ry. Co. v. Gesswine* (C. C. A.), 553.

In action for death of engineer from defective roadbed, plea which alleged that railroad's servants did not know of the conditions in time to give warning to deceased was bad for failing to show that defendant had made efforts to inform itself. *Western Ry. v. Russell* (Ala.), 225.

In action for death of engineer from defective roadbed, question of sufficiency of plea alleging that the railroad's servants did not know of the defect in time to give deceased warning was rendered immaterial by its plea to the general issue. *Western Ry. v. Russell* (Ala.), 225.

In action for death of engineer from defective roadbed, where defendant pleaded to the general issue to the complaint charging negligence, and also pleaded that the injury was the result of mere negligence, a demurrer to latter plea was properly sustained, as the fact stated therein was provable under the general issue. *Western Ry. v. Russell* (Ala.), 225.

In action for injuries to locomotive fireman, caused by defect in water gauge glass, an instruction, that to overcome the effect of the prima facie evidence of negligence arising from proof of such defect, "the defendant company is required to satisfy the jury by a preponderance of the evidence that it was not negligent," is erroneous. *Klunk v. Hocking Valley Ry. Co.* (Ohio), 438.

In action for injury to brakeman, a charge on the issue of defendant's negligence was not erroneous because it failed, in stating the conditions of defendant's liability, to take into consideration the questions of assumption of risk, contributory negligence, and a violation of the railroad's rules. *Mumford v. Chicago R. I. & P. Ry. Co.* (Iowa), 431.

In action for injury to brakeman, which resulted from the ignition of a trestle, an instruction that it was the duty of the railroad to use ordinary care to keep its right of way free from combustible matter which would be "liable" to take fire was erroneous, because of possibility of the word "liable" being construed to mean within the range of possibility. *Root v. Kansas City Southern Ry. Co.* (Mo.), 171.

MASTER AND SERVANT—Continued

- In action for injury to street car conductor from alleged defective rail, certain instruction was not objectionable on the ground that it assumed that the rail was defective. *Moore v. St. Louis Transit Co. (Mo.)*, 444.
- Incompetency of brakeman was question for jury. *Louisville & N. R. Co. v. Wyatt's Adm'r (Ky.)*, 413.
- In order to charge railroad with notice of a defective car, it is not necessary that such notice be given to the particular official designated by its rules. *Chicago & A. Ry. Co. v. Walters (Ill.)*, 166.
- Inspection of appliances, master's negligence in failing to perform duty when question for jury. *Drake v. San Antonio & A. P. Ry. Co. (Tex.)*, 157.
- Liability of master not created by servant's use of former's facilities without his consent. *St. Louis Southwestern Ry. Co. v. Harvey (C. C. A.)*, 379.
- Location of switch stand in railroad yard was a part of an engineering scheme in the construction of the railroad, and, in the absence of manifest errors in its construction patent to an ordinary observer, did not involve a question of negligence to be passed on by a jury, in an action against the railroad for injuries to its switchman, sustained while using the switch. *Chicago, etc., Ry. Co. v. Riley (C. C. A.)*, 403.
- Neglect by master of some duty owing to injured servant must be shown to have been the proximate cause of the injury. *Norfolk & W. Ry. Co. v. Gesswine (C. C. A.)*, 553.
- Neglect of superintendent of servant to warn him of approach of train. *Dunphy v. Boston Elevated Ry. Co. (Mass.)*, 862.
- Negligence in failing to warn switchman of danger of switch handle coming in contact with car steps. *Chicago, etc., Ry. Co. v. Riley (C. C. A.)*, 403.
- Negligence of injured employer's helpers, while engaged in transferring coal from car to tender, was question for jury. *Fitzgerald v. Southern Ry. Co. (N. Car.)*, 368.
- Negligence of master was question for jury, in action by brakeman for injuries resulting from his jumping from engine through fear that it would go through burning trestle, alleged to have ignited through negligence in allowing combustible debris to accumulate. *Root v. Kansas City Southern Ry. Co. (Mo.)*, 171.
- Negligence question for jury in action for injuries to street car conductor resulting from derailment of car because of an alleged defective rail. *Moore v. St. Louis Transit Co. (Mo.)*, 444.
- Presumption of negligence under section 3365-21 Ohio Rev. St., 1906, effect of in action for injury to employee from defective appliance. *Klunk v. Hocking Valley Ry. Co. (Ohio)*, 438.
- Presumption of negligence where brakeman is injured because of derailment of car. *Hemphill v. Buck Creek Lumber Co. (N. Car.)*, 411.
- Question for jury whether fire was communicated to trestle from combustible debris negligently allowed to accumulate by defendant. *Root v. Kansas City Southern Ry. Co. (Mo.)*, 171.
- Res ipsa loquitur*, doctrine not applicable to negligence cases arising between master and servant. *Northern Pac. Ry. Co. v. Dixon (C. C. A.)*, 242.
- Res ipsa loquitur*, doctrine was applicable where railroad employee was engaged in work between coal car and tender, and his helpers were shoveling coal from the car to the tender, while they knew of his presence there, and he was injured by a piece of coal falling on him. *Fitzgerald v. Southern Ry. Co. (N. Car.)*, 368.
- Sufficiency of complaint, in action against railroad for death of engineer from defective roadbed. *Western Ry. v. Russell (Ala.)*, 225.

MASTER AND SERVANT—Continued.

Train dispatcher may rely on local telegraph operator's statements relative to the location of trains. *Northern Pac. Ry. Co. v. Dixon* (C. C. A.), 242.

Where complaint, in action against railroad for death of engineer from defective roadbed, alleges that defendant negligently failed to warn decedent of the conditions of roadbed, a plea that decedent's death resulted from a washout caused by rainfall so heavy as to amount to an act of God, is insufficient. *Western Ry. v. Russell* (Ala.), 225.

Who Are Employees.

Certain evidence did not show that foreman of day railroad gravel dump crew was in defendant's employment when he was killed after the expiration of his hours of service. *Baker's Adm'r v. Lexington & E. Ry. Co.* (Ky.), 223.

Contract, under which railroad let cabs out to drivers, was one of bailment, and not one creating the relation of master and servant. *McColligan v. Pennsylvania R. Co.* (Pa.), 427.

Master is one who stands to another in such relation that he not only controls the result of the work of the other, but also may direct the manner in which it shall be done. *McColligan v. Pennsylvania R. Co.* (Pa.), 427.

Servant is one employed to render services to his employer, otherwise than in the pursuit of an independent calling, and who remains under the control of the master. *McColligan v. Pennsylvania R. Co.* (Pa.), 427.

When does relationship of master and servant exist. *McColligan v. Pennsylvania R. Co.* (Pa.), 427.

Where an employer lends his employee to a third person for a particular employment, the employee, for anything done in the particular employment, is the employee of the third person, though he remains the general employee of his original employer. *Wiest v. Coal Creek R. Co.* (Wash.), 398.

MISFEASANCE.

See **CROSSINGS.**

MONOPOLIES.

Clear preponderance of proof is essential to establish that parties to transaction, by which new corporation acquired controlling interest in capital stock in two competing railroad corporations, agreed that the new corporation should hold such stock as trustee or bailee for the stockholders, where the transaction on its face was one of purchase and sale. *Harriman, etc., v. Northern Securities Co.* (U. S.), 124.

Parties to transaction adjudged to violate the federal anti-trust act of July 2, 1890, are not exempt from the doctrine in *pari delicto* on the theory that they acted in good faith, where with knowledge of the facts and of the statute, they acted under the mistaken supposition that the statute would not be held applicable to the facts. *Harriman, etc., v. Northern Securities Co.* (U. S.), 124.

Question whether corporation organized pursuant to a combination of stockholders in two competing interstate railroad companies, to acquire controlling interest in their capital stock, holds same as absolute owner or as trustee or bailee, was not determined by a decree adjudging the combination illegal, etc. *Harriman, etc., v. Northern Securities Co.* (U. S.), 124.

Rule that property delivered under illegal contract cannot be recovered by parties in *pari delicto* prevents original stockholders in two competing railway companies from reclaiming the specific shares of stock which they delivered to a stockholding corporation in exchange for its capital stock, pursuant to a combination subsequently adjudged illegal. *Harriman, etc., v. Northern Securities Co.* (U. S.), 124.

MUNICIPAL CORPORATIONS.

See RAILROAD AID; BONDS; STREET RAILWAYS.

NEGLIGENCE.

See ACCIDENTS ON TRACK; ANIMALS; CARRIERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; EMPLOYERS' LIABILITY ACTS; EVIDENCE; FEDERAL JURISDICTION; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; INDEPENDENT CONTRACTORS; LIMITATION OF ACTIONS; MASTER AND SERVANT; RAILROADS IN STREETS; RIGHT OF WAY; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.

Alternative allegations of, under Ky. Civ. Code, Prac. § 113, subsec.

4. *Louisville & N. R. Co. v. Wyatt's Adm'r* (Ky.), 413.

Child injured by picking up live wire which had fallen to sidewalk, certain testimony did not show that lack of insulation, and not the falling of the wire, was proximate cause of the injury. *Norfolk Ry. & Light Co. v. Spratley* (Va.), 260.

Complaint, in action for running street car against child, sufficiently charged an intentional wrong. *Birmingham Ry., L. & P. Co. v. Jones* (Ala.), 568.

Complaint, in action for running street car against child, sufficiently charged simple negligence in the management of the car. *Birmingham Ry., L. & P. Co. v. Jones* (Ala.), 568.

Electric companies are not insurers against accidents, but are held to a high degree of care in the construction and maintenance of their dangerous appliances, live wires, etc. *Norfolk Ry. & Light Co. v. Spratley* (Va.), 260.

Evidence.

Customs and usages must be uniform, known, certain or notorious. *Chicago, etc., Ry. Co. v. Lindeman* (C. C. A.), 549.

Evidence was insufficient to warrant finding that the alleged custom was uniform, and, therefore, the question of its existence should not have been submitted to jury. *Chicago, etc., Ry. Co. v. Lindeman* (C. C. A.), 549.

Precautions against recurring injury, evidence of not admissible on issue whether appliance was reasonably safe before the repairs were made, nor for any other purpose. *Louisville & N. R. Co. v. Morton* (Ky.), 249.

Where negligence of person on particular occasion is in issue, it is usually permissible to prove every fact known to such person at the time which would have a reasonable tendency to increase or decrease the danger of a particular course of action. *Bresee v. Los Angeles Traction Co.* (Cal.), 537.

Imputed Negligence.

Negligence of driver of vehicle imputable to its occupant. *Bresee v. Los Angeles Traction Co.* (Cal.), 537.

In action against street railway for running car against child, it was the duty of the company to request a charge explanatory of the effect of contributory negligence on the count charging simple negligence, if it deemed that important. *Birmingham Ry., L. & P. Co. v. Jones* (Ala.), 568.

In action by boy for personal injuries sustained while walking near the track of a railroad temporarily laid on a street there was no evidence of negligence on part of defendant railroad. *Keller v. Philadelphia & R. Ry. Co.* (Pa.), 599.

In view of instruction given on the subject of the weight of evidence, it was not necessary for the court to charge to find for defendant, if the weight of the evidence was in favor of defendant,

NEGLIGENCE—Continued.

- or if it was equally balanced. *Hickey v. Rio Grande Western Ry. Co. (Utah)*, 318.
- Ordinary care, definition. *Louisville Ry. Co. v. Esselman (Ky.)*, 627.
- Presumption of negligence from fact that child was injured by picking up live wire which had fallen to sidewalk. *Norfolk Ry. & Light Co. v. Spratley (Va.)*, 260.
- Presumption of negligence from fact that child was injured by picking up live wire which had fallen to sidewalk was not rebutted by testimony of lineman as to his inspection of the wire. *Norfolk Ry. & Light Co. v. Spratley (Va.)*, 260.
- Presumption of negligence from injury to pedestrian in street from broken electric wire is not overcome by testimony of employees of owner of wire that it was properly constructed and put up. *Norfolk Ry. & Light Co. v. Spratley (Va.)*, 260.
- Railroad owes no duty to public to keep in safe repair for pedestrians path across its yards, which the public has been in the habit of using without objection from the railroad. *Atchison, etc., Ry. Co. v. Fuller (Kan.)*, 620.
- Rule is that he who affirms must prove; and when the whole of the evidence upon the issue involved leaves the case in equipoise, the party affirming must fail. *Klunk v. Hocking Valley Ry. Co. (Ohio)*, 438.
- Where cause of an accident in a personal injury action is conjectural merely, the case should not go to the jury. *Powers v. Pere Marquette R. Co. (Mich.)*, 559.
- Where question as to negligence or contributory negligence is so presented that jurors might fairly differ as to the deduction to be drawn, the question is for the jury. *Indianapolis St. Ry. Co. v. Marschke (Ind.)*, 609.
- When question for jury, and when question of law for the courts. *Union Pac. R. Co. v. Brown (Kan.)*, 448.
- Where the case as submitted to the jury does not consist solely of issues of negligence raised on the complaint, but includes the affirmative issue of contributory negligence raised by defendant, a charge that, if the evidence is equally balanced the issue should be found for defendant, is incorrect. *Hickey v. Rio Grande Western Ry. Co. (Utah)*, 318.
- Where, under a contract between drivers of cabs and a railroad company, the relation of master and servant was not created, but the contract was one of bailment, the railroad company was not liable for injuries sustained through the negligence of a cab driver. *McColligan v. Pennsylvania R. Co. (Pa.)*, 427.

ORDINANCES.

See CHILDREN; CONSTITUTIONAL LAW; STREET RAILWAYS; TICKETS AND FARES.

ORDINARY CARE.

See NEGLIGENCE.

PERSONAL INJURIES.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; DEATH BY WRONGFUL ACT; EMPLOYERS' LIABILITY ACTS; FRIGHTENING TEAMS; LICENSEES; MASTER AND SERVANT; NEGLIGENCE; RAILROADS IN STREETS; STREET RAILWAYS; TRESPASSERS.

Contributory Negligence.

When question for jury. *Foster v. East Jordan Lumber Co. (Mich.)*, 282.

PERSONAL INJURIES—Continued.**Damages.**

- Disease aggravated by injuries, instruction clearly limited plaintiff's recovery to the injuries he sustained by reason of defendant's negligence, and was therefore proper. *Southern Pac. Co. v. Cavin* (C. C. A.), 803.
- Future evil effects. *Chicago, etc., Ry. Co. v. Lindeman* (C. C. A.), 549.
- Future pain and other probable consequences. *Norfolk Ry. & Light Co. v. Spratley* (Va.), 260.
- Future pain must be reasonably certain to authorize recovery for it. *Chicago, etc., Ry. Co. v. Lindeman* (C. C. A.), 549.
- General and special damages recoverable, correct instruction. *Louisville Ry. Co. v. Blum* (Ky.), 44.
- In action by husband and wife to recover for injuries to the wife, the husband can show the value of the wife's services in his business as florist as an element of damage to him. *Standen v. Pennsylvania R. Co.* (Pa.), 601.
- In action for personal injuries, aggravation of an existing bodily condition is not special damages that must be specially pleaded. *Indiana Union Traction Co. v. Jacobs* (Ind.), 653.
- Measure of damages, party could not complain of failure to give instruction not requested. *Louisville Ry. Co. v. Blum* (Ky.), 44.
- On appeal, question whether there was error in permitting injured child's mother to testify that she had spent \$7 for medicines was precluded by the maxim, "de minimis non curat lex." *Norfolk Ry. & Light Co. v. Spratley* (Va.), 260.
- Pa. Act. June 8, 1893, vesting in a married woman all earnings by her in carrying on any separate business, does not deprive the husband of his common-law right to the earnings or services of his wife rendered by her in and about their domestic affairs or his business, and, in absence of an agreement to the contrary, such earnings belong to the husband. *Standen v. Pennsylvania R. Co.* (Pa.), 601.
- Salary received by railway mail clerk during time he was incapacitated, being a gratuity of the government, cannot be considered in determining the damages in consequence of the injury. *Illinois Cent. R. Co. v. Porter* (Tenn.), 686.
- Verdict was not excessive, in action for injuries to fireman. *Illinois Cent. R. Co. v. Quirey* (Ky.), 162.
- Verdict will not be disturbed on appeal where there is nothing to show that jury were actuated by prejudice or partiality. *Norfolk Ry. & Light Co. v. Spratley* (Va.), 260.
- Declaration in trespass vi et armis, which alleged that because of an assault plaintiff was injured, did not authorize a recovery for aggravation of plaintiff's mental derangement. *Lindsay v. Wabash Ry. Co.* (Mich.), 62.

Evidence.

- Evidence of plaintiff's subsequent mental condition was inadmissible, under the declaration. *Lindsay v. Wabash Ry. Co.* (Mich.), 62.
- It was proper to overrule motion to strike answer as to what plaintiff said, as the declaration was but introductory to the medical witness' treatment of the case and made to one competent to judge as to its truth or falsity. *Indiana United Traction Co. v. Jacobs* (Ind.), 653.
- Life tables as evidence of plaintiff's expectancy of life. *Southern Pac. Co. v. Cavin* (C. C. A.), 803.
- Plaintiff was entitled to show, on cross-examination, that neurasthenia might have been caused by sudden fright, where she was physically injured at time of such fright. *Elgin, A. & S. Traction Co. v. Wilson* (Ill.), 37.

PERSONAL INJURIES—Continued.

Proper to permit physician to testify as to probable effect of plaintiff's injuries. *Norfolk Ry. & Light Co. v. Spratley (Va.)*, 260.

Though evidence of size of plaintiff's family was erroneously admitted, an affirmance of judgment was allowed on remittitur of a sum which would cure any possible prejudice. *Western Ry. v. Russell (Ala.)*, 225.

Proof that one of plaintiff's legs was broken and an elbow injured is no variance from an allegation that divers bones of her body were broken. *Elgin, A. & S. Traction Co. v. Wilson (Ill.)*, 37.

Verdict for \$750 was not excessive, though plaintiff's physician testified he was not sure that her health was permanently injured. *Illinois Cent. R. Co. v. Colly (Ky.)*, 251.

Where the evidence, in an action for personal injuries, is conflicting, defendant cannot complain of a lack of an instruction as to the weight of testimony of witnesses, where he did not make a request therefor. *Standen v. Pennsylvania R. Co. (Pa.)*, 601.

PLEADING.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; FEDERAL JURISDICTION; LIMITATIONS OF ACTIONS; MASTER AND SERVANT; NEGLIGENCE; PERSONAL INJURIES.

POLICE POWERS.

See STREET RAILWAYS.

PRESUMPTION OF NEGLIGENCE.

See CARRIERS OF PASSENGERS; CROSSINGS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS IN STREETS; STOCK, INJURIES TO.

PRESUMPTIONS.

See CONNECTING CARRIERS; FIRES SET BY LOCOMOTIVES.

PRIMA FACIE CASE.

See PRESUMPTION OF NEGLIGENCE.

PROCESS.

See RAILROADS.

PUBLIC LANDS.

See RIGHT OF WAY.

PUNITIVE DAMAGES.

See CARRIERS OF PASSENGERS.

RAILROAD AID BONDS.

Right of township to maintain action to recover value of bonds voted to aid in constructing railroad doubted. *Lincoln Tp. v. Kansas City, etc., R. Co. (Neb.)*, 364.

RAILROAD COMMISSIONS.

See INTERSTATE COMMERCE.

Findings of fact by railroad commission after due hearing will not be reviewed by the Supreme Court, in the absence of allegations of fraud or other grounds for setting aside the adjudication. *Railroad Com'rs v. Atlantic Coast Line R. Co. (S. Car.)*, 745.

RAILROADS.

See EMINENT DOMAIN; INDEPENDENT CONTRACTORS; LEASES AND RUNNING POWERS; MASTER AND SERVANT; MONOPOLIES; NEGLIGENCE; RIGHT OF WAY; SPURS AND SIDE TRACKS; STREET RAILWAYS.

A corporation is not, merely because it is a creature of the law without physical existence, immune from criminal prosecution for nonfeasance in neglecting to perform duties which it owes to the public. *Southern Ry. Co. v. State* (Ga.), 475.

Cannot acquire property by dedication. *Scovell v. St. Louis Southwestern Ry. Co.* (La.), 842.

Foreign railroad operating in Georgia and its engineer may be jointly sued for a negligent homicide in the county in which the cause of action originated, even though the residence of the engineer be in another county in the state. *Southern Ry. Co. v. Grizzle* (Ga.), 451.

Purchaser of railroad at foreclosure sale not answerable for general debts of its predecessor corporation. *Lincoln Tp. v. Kansas City, etc., R. Co.* (Neb.), 364.

Term "railroads" includes all side tracks necessary or convenient for the transaction of the company's business. *Roby v. State* (Neb.), 851.

When a corporation which is under indictment voluntarily makes an appearance in court and demurs to the indictment, it thereby waives service of process upon it in the manner prescribed by statute. *Southern Ry. Co. v. State* (Ga.), 475.

RAILROADS IN STREETS.

See NEGLIGENCE; STOCK, INJURIES TO; TRESPASSERS.

Contributory Negligence.

Assumption of risk of injuries from coming in contact with semaphore wires or any other stationary appliances which are convenient or necessary for the safe operation of trains. *Atchison, etc., Ry. Co. v. Fuller* (Ky.), 620.

No duty rests on a railroad company, running its trains over tracks on a public street, to continuously give danger signals. *Keller v. Philadelphia & R. Ry. Co.* (Pa.), 599.

Presumption of negligence where train is run at speed in violation of ordinance. *Chicago & E. I. R. Co. v. Crose* (Ill.), 512.

Presumption of negligence where train is run at speed in violation of ordinance is a rebuttal one. *Chicago & E. I. R. Co. v. Crose* (Ill.), 512.

Rebuttal of presumption of negligence arising where train is run through streets in violation of speed ordinance. *Chicago & E. I. R. Co. v. Crose* (Ill.), 512.

Remedy of lot owner where illegal use of street by railroad. *Hall v. Pennsylvania R. Co.* (Pa.), 840.

Running train through streets at unlawful speed, certain instruction, in action for killing horses, in view of a latter instruction, was not erroneous as failing to state that the unlawful speed must have been the proximate cause, and that it declared a fixed liability. *Chicago & E. I. R. Co. v. Crose* (Ill.), 512.

Trackmen employed by railroad, and engaged in repairing track, are not within protection of city ordinance limiting speed of trains. *Norfolk & W. Ry. Co. v. Gesswine* (C. C. A.), 553.

RAPE.

See CARRIERS OF PASSENGERS.

RECEIVERS.

Where receivers of a street railway company sold its rails and tracks laid in a street to petitioner, the latter's failure to or-

RECEIVERS—Continued.

ganize a corporation and operate the road did not divest him of title to the property purchased. Under Mass. Rev. Laws, c. 112, § 12. *Graham v. Chicago & N. W. Ry., Co.* (Iowa), 811.

REMEDIES.

See RAILROADS IN STREETS.

REMITTITUR.

See CARRIERS OF GOODS.

REMOVAL OF CAUSE.

See FEDERAL JURISDICTION.

RES GESTÆ.

See CARRIERS OF PASSENGERS; EVIDENCE; STOCK, INJURIES TO; STREET RAILWAYS.

RES IPSA LOQUITUR.

See ACCIDENTS ON TRACK; MASTER AND SERVANT; PRESUMPTION OF NEGLIGENCE.

RESTRAINT OF TRADE.

See MONOPOLIES.

RIGHT OF WAY.

See EMINENT DOMAIN; STREET RAILWAYS.

Damages.

Damage to stock from loss by fire which may result from negligence of railroad is too remote to be considered, where it is sought to condemn right of way through stock farm. *Hickey v. Rio Grande Western Ry. Co.* (Utah), 318.

Increased risk of loss from fire and increased damages to live stock to be considered only so far as it affects market value of land not taken, where it is sought to condemn railroad right of way through stock farm. *Chicago Southern Ry. Co. v. Nolin* (Ill.), 331.

Evidence.

In trespass against railroad for damages to plaintiff's land, owing to the destruction of plaintiff's fences, etc., it was error to admit evidence of liability under a contract, in which the railroad agreed to replace the fences in time to protect the crops. *St. Louis, etc., Ry. Co. v. Gillihan* (Ark.), 624.

Location of railroad right of way over lands of the state does not invest the railroad with the right to condemn other lands covered by such location. *Shamberg v. New Jersey Shore Line R. Co.* (N. J.), 854.

Where land was conveyed "for railroad purposes only," grantor could not obtain cancellation of the conveyance on the ground that it was understood that defendant would use the land in connection with a main line through the town where the land was situated, but had only built a branch line. *Mobile, etc., R. Co. v. Kamper* (Miss.), 362.

Where land was conveyed to a company "for railroad purposes only," and the railroad abandoned some of the land, the grantor was entitled to recover such portion. *Mobile, etc., R. Co. v. Kamper* (Miss.), 362.

RULES.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

RULES AND REGULATIONS.

See TICKETS AND FARES.

RUNNING POWERS.

See LEASES AND RUNNING POWERS.

SALES.

See RAILROADS; RECEIVERS.

SEPARABLE CONTROVERSY.

See FEDERAL JURISDICTION.

SERVANT'S LIABILITY.

See CROSSINGS.

SERVANTS OF OTHER COMPANIES.

See LICENSEES.

SET-OFF.

See DEATH BY WRONGFUL ACT.

SIDETRACKS.

See LICENSEES.

SIGNALS.

See ACCIDENTS ON TRACK; ANIMALS; CROSSINGS;
RAILROADS IN STREETS.

SLEEPING CAR COMPANIES.

Care required of company to watch over its passengers to protect them from injury. *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 782. Sleeping car company, sued as codefendant with railroad, could not complain that an instruction imposed a lower degree of care on railroad than the law would exact. *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 782.

SPECIAL DAMAGES.

See CARRIERS OF GOODS.

SPEED.

See EVIDENCE; MASTER AND SERVANT.

SPURS AND SIDE TRACKS.

Presumption was that side track is a part of the public highway system of the railroad company, and a public highway, within meaning of Neb. Const. art. 11, § 4. *Roby v. State* (Neb.), 851. Use of side track, sufficiency of evidence of. *Roby v. State* (Neb.), 851.

STARE DECISIS.

See MONOPOLIES.

STATUTES.

See CONSTITUTIONAL LAW; STREET RAILWAYS.

STOCK, INJURIES TO.

See ANIMALS; EVIDENCE; STREET RAILWAYS; TRIAL. Burden of proving reckless or wanton misconduct of trainmen. *Russell v. Maine Cent. R. Co.* (Me.), 308. Burden on plaintiff to show that hog was killed through negligence of street railway. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631. Care due from trainmen to stock unlawfully at large. *Russell v. Maine Cent. R. Co.* (Me.), 308.

STOCK, INJURIES TO—Continued.

Care required of motorman after seeing hog's peril, certain instruction was properly refused. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

Contributory Negligence.

Allowing hog to run at large. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

Question for jury where team of horses, frightened at train, were killed. *Chicago & E. I. R. Co. v. Crose* (Ill.), 512.

Where, in an action against a street railroad for the killing of a hog, it appeared that the hog was outside of the stock limit, it was not contributory negligence to allow it to run at large. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

Evidence.

In action against street railroad for killing of hog, it was proper to admit evidence that motorman remarked at the time "that the hog jumped on the track right in front of the car." *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

In action against street railway for the killing of a hog, it was proper to admit evidence that the motorman remarked at the time "that hog jumped on the track in front of the car." *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

Hog killed by street car, liability of street railway. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

In action against street railway for the killing of a hog, plaintiff was not entitled to recover, in the absence of evidence that the hog went on the track in front of the motorman in time for him to have stopped the car before striking it, had he seen it and used all the means in his power to that end. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

In action for the killing of a team, certain instruction was not erroneous as failing to state that the proximate cause of the injury must have been the unlawful speed of the train. *Chicago & E. I. R. Co. v. Crose* (Ill.), 512.

Instruction omitting to hypothesize the fact that the engineer was keeping a proper lookout and could not have discovered the horse earlier, and that the train was properly equipped, was properly refused. *Southern Ry. Co. v. Pogue* (Ala.), 526.

Instruction that, if the horse was killed because speed of train prevented it being stopped within glare of headlight, plaintiff was entitled to recover, was proper. *Southern Ry. Co. v. Pogue* (Ala.), 526.

Instruction that, if the motorman exercised reasonable care after he discovered the danger of the hog and was unable to save it, the jury should find for defendant, was properly refused. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

Instruction was erroneous because there was no evidence tending to show that the motorman could have seen the hog when a sufficient distance away to have permitted him to stop the car. *Little Rock Ry. & Electric Co. v. Newman* (Ark.), 631.

Insufficient evidence to show reckless or wanton misconduct of trainmen. *Russell v. Maine Cent. R. Co.* (Me.), 308.

Liability for injury to horse unlawfully at large dependent upon existence of reckless or wanton misconduct of trainmen. *Russell v. Maine Cent. R. Co.* (Me.), 308.

Negligence of railroad was question for jury. *Southern Ry. Co. v. Pogue* (Ala.), 526.

Ownership of animal killed by train, circumstantial evidence of. *Southern Ry. Co. v. Pogue* (Ala.), 526.

Presumption of negligence where stock is killed by train running at unlawful speed, instruction as to was not erroneous on the ground that it directed verdict for plaintiff. *Chicago & E. I. R. Co. v. Crose* (Ill.), 512.

STOCK, INJURIES TO—Continued.

Proof the animal killed was a "mare" did not constitute a fatal variance. *Southern Ry. Co. v. Pogue* (Ala.), 526.

Railroad owes no duty of fencing its road, as to owner of horse being pastured in the pasture of a third person, which does not join the railroad location, even if the owner has the right to lead the horse over the land between the pasture and the railroad. *Russell v. Maine Cent. R. Co.* (Me.), 308.

STREET RAILWAYS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; CONSTITUTIONAL LAW; CROSSINGS; MASTER AND SERVANT; NEGLIGENCE; RECEIVERS; STOCK, INJURIES TO; TRIAL.

Action of municipal authorities in granting and revoking privileges in highways is the exercise of delegated police power, and not judicial in character. *Wheeling & E. G. R. Co. v. Town of Triadelphia* (W. Va.), 336.

Alienation of franchise. *French v. Jones* (Mass.), 817.

Assignment by individuals of their rights under a void ordinance, granting them a street railway franchise, to a subsequent corporation did not operate as an assignment of a petition by property owners for the passage of an ordinance granting a street railway franchise, so as to entitle city council to pass another ordinance thereunder granting a new franchise to the corporation. *Wilder v. Aurora, etc., Elec. Trac. Co.* (Ill.), 99.

Bill to restrain construction of railway in front of complainant's premises, which alleged ownership of fee to center of street, and that defendants were about to construct a commercial railroad without affording compensation, etc., presented a constitutional question, warranting direct appeal to supreme court. *Wilder v. Aurora, etc., Elec. Trac. Co.* (Ill.), 99.

Borough could not require a later company, having permission to use the same street, to so lay its tracks as to straddle the tracks of the other company. *Commonwealth v. Bond* (Pa.), 825.

Burden of proving negligence on part of railway, in action for injuries sustained by pedestrian in collision with street car. *Garvick v. United Rys. & Elec. Co.* (Md.), 615.

Certain consent of board of commissioners of Ohio county does not confer upon the railway company right to construct its railway on and over such portion of the Cumberland Road as lies within the limits of the town of Triadelphia, without the consent of the town authorities. *Wheeling & E. G. R. Co. v. Town of Triadelphia* (W. Va.), 336.

Certain electric street railway was a commercial railroad, and was not entitled to lay its tracks in streets, the fee of which was in abutting owners, without condemning right to do so. *Wilder v. Aurora, De K. & R. Elec. Trac. Co.* (Ill.), 99.

Contributory Negligence.

Bicyclist taking chances in crossing street car track when view of car was obstructed. *Bartlett v. Worcester Consol. St. R. Co.* (Mass.), 267.

Railway was entitled to instruction that, though it was negligent in running car against plaintiff, yet, if he was also negligent, and his negligence contributed to the accident, so that but for it he would not have been injured, there could be no recovery. *Lexington St. Ry. v. Strader* (Ky.), 273.

Damages.

Mass. Statute, making street railway liable for injuries sustained during construction resulting from carelessness, has no application to injuries sustained by abutting owner from slight

STREET RAILWAYS—Continued.

raising of grade of surface of street by railway company in process of construction. *Laroe v. Northampton St. Ry. Co.* (Mass.), 96.

Railway was not liable for slight raising of street grade from 6 to 15 inches, reasonably necessary as a matter of proper construction. *Laroe v. Northampton St. Ry. Co.* (Mass.), 96.

Where street grade is altered by grant of location of street railway, it is not altered "for the purpose of repairing such way," within statute providing that an abutter shall be entitled to compensation for damages sustained by change of grade of a public way, or for purpose of repairing such way. *Laroe v. Northampton St. Ry. Co.* (Mass.), 96.

Evidence.

Statement of motorman of car which collided with plaintiff as to his reason for not sounding the gong or stopping the car was a part of the *res gestæ*. *Lexington St. Ry. v. Strader* (Ky.), 273.

Fact that amending franchise ordinance recited that it had been petitioned for by the owners of the land representing more than one-half of the frontage of each and every mile of streets sought to be used by the traction company, etc., did not justify a conclusion on demurrer to bill to restrain construction of railway that such ordinance had been petitioned for. *Wilder v. Aurora, etc., Elec. Trac. Co.* (Ill.), 99.

Forfeiture of rights under ordinance granting right to use streets. *Wheeling & E. G. R. Co. v. Town of Triadelphia* (W. Va.), 336.

Kirby's Dig., § 6773, making railroads responsible for all damages to property caused by the running of trains, is not applicable to street railroads. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

Lookout duty of motorman. *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 573.

Mutual rights and duties of those in charge of street cars and those driving other vehicles in streets. *Halloran v. Worcester Consol. St. Ry. Co.* (Mass.), 582.

Not "railroads," within meaning of Arkansas statute making "railroads" liable for all damages to property caused by the running of trains. *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 631.

One who had purchased a street railway at a receiver's sale could not be compelled to use the tracks so purchased for the operation of a street railway. *French v. Jones* (Mass.), 817.

Ordinance granting right to use streets, whether a contract. *Wheeling & E. G. R. Co. v. Town of Triadelphia* (W. Va.), 336.

Ordinance was not invalid because passed as an amendment to a void ordinance granting street railway franchise to individuals. *Wilder v. Aurora, etc., Elec. Trac. Co.* (Ill.), 99.

Rails of street railway company as personal property. *French v. Jones* (Mass.), 817.

Right of street railway company, after repeal of ordinance granting it right to use streets, to prevent town, by injunction, from removing its tracks, if no cause of forfeiture existed, or the circumstances shown are such as to call for the exercise of equity jurisdiction to relieve from forfeiture of right to use streets. *Wheeling & E. G. R. Co. v. Town of Triadelphia* (W. Va.), 336.

Under certain statutes of Illinois, ordinance granting street railway franchise to individuals was void. *Wilder v. Aurora, etc., Elec. Trac. Co.* (Ill.), 99.

Violation of speed ordinance as negligence per se. *Bresee v. Los Angeles Traction Co.* (Cal.), 537.

Where a street railway company is granted permission to lay its tracks in a street, allowing a later corporation to lay a part of

STREET RAILWAYS—Continued.

its tracks on the tracks of the first company is unconstitutional. *Commonwealth v. Bond* (Pa.), 825.

Where petitioner, as purchaser at a receiver's sale, owned the rails and tracks of a street railway imbedded in a street, the superintendent of streets could not arbitrarily refuse a permit to remove them, because he hoped some other person or corporation would operate cars over them, but was bound to grant or refuse such license in the exercise of a legal discretion. *French v. Jones* (Mass.), 817.

Where petition of abutting owners for grant of street railway franchise prayed that such grant should be for term of 40 years from passage of ordinance, an ordinance, granting authority to traction company for 38 years from its passage did not conform to such petition. *Wilder v. Aurora, etc., Elec. Trac. Co.* (Ill.), 99.

TAXATION.

Certain statutory provisions did not confer on a corporation formed under section 187, Md. Code, 1888, immunity from taxation which had been granted the mortgagor railroad. *Baltimore, C. & A. Ry. Co. v. Wicomico County Com'rs* (Md.), 829.

Conceding that a corporation formed under section 187, Md. Code, 1888, for the purchase of the road incorporated under the general law acquired the immunity from taxation possessed by the mortgagor road, there was no contract with the state, within Const. U. S., art. 1, cl. 10. *Baltimore, C. & A. Ry. Co. v. Wicomico County Com'rs* (Md.), 829.

Purchaser at sale under mortgage did not acquire certain exemption from taxation. *Baltimore, C. & A. Ry. Co. v. Wicomico County Com'rs* (Md.), 829.

TICKETS AND FARES.

See CARRIERS OF PASSENGERS.

Authority of station agent to inform prospective passenger as to best route to his destination. *St. Louis, etc., R. Co. v. White* (Tex.), 796.

Condition on street railway transfer that "holder, by accepting, agrees that, should any controversy arise as to its validity, holder will pay fare and call at company's office for correction," is void. *Georgia Ry. & Electric Co. v. Baker* (Ga.), 789.

Evidence.

Fact that pass over railroad was granted for a valuable consideration may be shown by parol. *Nickles v. Seaboard Air Line Ry.* (S. Car.), 755.

Instruction that, if a pass on which the person injured in a railway accident was carried was issued in pursuance of telegrams in evidence, it showed that it was issued without a valuable consideration, was properly refused as a charge on the facts. *Nickles v. Seaboard Air Line Ry.* (S. Car.), 755.

Ordinance construed as requiring defendant street railway company to sell tickets at certain rates to the students of a certain college. *Northrop v. City of Richmond* (Va.), 718.

Rule of carrier forbidding sale of tickets to infirm persons, validity. *Illinois Cent. R. Co. v. Allen* (Ky.), 49.

TRESPASS.

See EVIDENCE; RIGHT OF WAY.

TRESPASSERS.

See LICENSEES; NEGLIGENCE.

Care due licensees or trespassers using path across railroad yard. *Atchison, etc., Ry. Co. v. Fuller* (Kan.), 620.



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